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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM LEIGHTON,

Petitioner, Objector-Appellant below,

vs.

UNIROYAL, Inc. et al.,

Respondents, Defendants-Appellees

below,

and

BERNARD POGOSTIN,

Respondent, Plaintiff-Appellee below

PETITION FOR CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

William Leighton

Petitioner

249 West 11th Street

New York, N.Y., 10014

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October, 1987

QUESTIONS PRESENTED

1. Whether Article VI, Second Clause of the Constitution of the United States requires the New Jersey courts to test the Uniroyal-CDU merger according to the provisions of the Investment Company Act of 1940 at the instance of petitioner, an objector to the settlement of a class action and derivative suit involving the merger, regardless of whether petitioner would have had standing, under New Jersey law, to sue as a plaintiff in order to set aside the merger.

2. Whether the New Jersey courts have unconstitutionally discriminated against petitioner and in favor of respondent Pogostin, by failing to decide whether Pogostin qualified, under New Jersey law, both as a derivative plaintiff and as a class representative while holding that petitioner did not qualify, under New Jersey law, as an objector.

LIST OF PARTIES

Petitioner, objector and appellant below, became a record shareholder of Uniroyal First Preferred stock on November 18, 1985 by open purchase on the New York Stock Exchange. This was three days before the "fairness" hearing that settled a derivative and class suit challenging the Uniroyal-CDU merger as being unfair to the First Preferred shareholders. Petitioner has been a First Preferred shareholder continuously since that time. Petitioner has borne his own litigation expenses.

Respondent Uniroyal, Inc., defendant and appellee below, is a New Jersey corporation headquartered in Connecticut, whose executive offices are in New York City. The First Preferred was listed on the N.Y.S.E. until July, 1986.

Respondents, defendants and appellees below, Ross Barzelay, David Beretta, Norborne Berkeley, Jr., E. Paul Casey, Frederick Colombo, E. Raymond Corey, Joseph P. Flannery, Allen J. Krowe, Horace C. McDonnel, Jr., Burnell R. Roberts, Howard B. Wentz, Jr. and W. Thomas York were directors of Uniroyal whose litigation expenses were advanced by Uniroyal pursuant to indemnification agreements.

Respondents Flannery, Barzelay, Beretta, Wentz and York are directors of CDU Holding, Inc. ("CDU"), a Delaware corporation which, over petitioner's objections, was not made a party to the action. CDU was an indispensable party to the action because it would receive releases from Uniroyal for any and all causes of action that were, or might have been, asserted in the amended and supplemental complaint.

Respondent Bernard Pogostin is a New York resident whose name has been used as a plaintiff below. There is reasonable doubt whether Pogostin has authorized that this suit be commenced in his name. Pogostin has not verified the amended and supplemental complaint, has not been required to post security for costs as required by New Jersey law and has not disclosed on the record the number of Preferred shares owned by him.

Pogostin's attorneys are the beneficiaries of a $600,000 judgment against Uniroyal that was signed after the "fairness" hearing. Petitioner has reason to believe that Pogostin's litigation expenses have been paid by his New York attorneys.

M.J. Whitman & Co., Inc. ("Whitman") is a New York investment adviser and client of Pogostin's New York attorneys. Whitman was awarded $150,000, on consent, payable by Uniroyal, as and

for an "expert's fee" for writing a two-page report with respect to the settlement which was not used by the courts below. Whitman has not been qualified as an "expert" by the courts below.

Table of Contents

	Page No.
Questions Presented	1
List of Parties	2
Table of Contents	5
Table of Authorities	6
Official and Unofficial Reports	7
Jurisdiction	7
Constitutional provision, statutes, rules and regulations	9
Statement of the Case	21
When and How the Federal Questions were Raised Below	33
Reasons for the Allowance of the Writ	34
Conclusion	45

Table of Authorities	Page No.
Andre v. M.L.P.F. & S., 97 F.R.D. 699 (S.D.N.Y., 1983)	45
Daily Income Fund v. Fox, 464 U.S. 523 (1984)	35
Feinberg v. Carter, 652 F. Supp. 1066 (S.D.N.Y.)	42
Harff v. Kerkorian, Del. Ch., 324 A. 2d 315	28, 36
Moran v. Household International, 500 A. 2d 1346 (Del. Supr.)	24
Pogostin v. Leighton, 523 A. 2d 1078, 216 N.J. Supr. 363 (1987)	7
U.S.A. v. Matthews, 787 F. 2d 38 (C.A. 2, 1986)	42
U.S.A. v. Standard Oil Co., 136 F. Supp. 345 (S.D.N.Y.)	43
Weiss v. Temporary Investment Fund, 465 U.S. 1001 (1984)	35
M.J. Whitman & Co., Inc. v. American Financial Enterprises et al. 725 F. 2d 394 (C.A. 6, 1984)	26, 35 39

Official and Unofficial Reports

The relevant portion of the oral opinion of the court of first instance, the Chancery Court of Bergen County, New Jersey, is reproduced in the appendix, R. 1a - 9a. No written opinion was filed. That court's order and final judgment is at R. 10a - 18a.

The opinion of the Appellate Division of the Superior Court of New Jersey, dismissing the appeal, is dated January 29, 1987. It has been published at 523 A. 2d 1078, 216 N.J. Sup. 363 (1987) and will be found at R. 19a - 52a. A motion for reconsideration was denied on March 12, 1987, R. 54a.

The order of the Supreme Court of New Jersey dated July 9, 1987, denying a petition for certification is at R. 56a.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec.

1257(3). The petition for certiorari is submitted within ninety days of the denial of certification by the Supreme Court of New Jersey, that State's highest court.

Constitutional Provisions, Statutes, Rules and Regulations

Constitution of the United States, Article VI, Section 2 :

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Investment Company Act of 1940, 15 U.S.C. Sec. 80a:

Sec. 3(a). When used in this title, "investment company" means any issuer which --- (3) is engaged or proposes to engage in the business of

investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 percentum of the value of such issuer's total assets * * *

(b)Notwithstanding paragaraph (3) of subsection (a), none of the following persons is an investment company within the meaning of this title: * * * (2) any issuer which the Commission, upon application by such issuer, finds and by order declares to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities * * *.

The filing of an application under this paragraph in good faith by an issuer other than a registered investment comapny shall exempt the applicant for a period of sixty days from all provisions of this title applicable to investment companies as such. * * *

Transactions by Unregistered Investment Companies

Sec. 7(a). No investment company organized or otherwise created under the laws of the United States or of a State and having a board of directors, unless registered under section 8, shall directly or indirectly--

(1) offer for sale, sell, or deliver after sale, by the use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security whether the issuer of such security is such investment company or another person; or offer for sale, sell or deliver after sale any such security or interest, having reason to believe that such security or interest will be made the subject of a public offering by use of the mails or any means or instrumentality of interstate commerce;

(2) purchase, redeem, retire, or otherwise acquire or attempt to acquire, by use of the mails or any means or instrumentality of interstsate commerce, any security or any interest in a security, whethere the issuer of such security is such investment company or another person;

(3) control any investment company which does any of the acts enumerated in paragraphs (1 and (2);

(4) engage in any business in interstsate commerce; or

(5) control any company which is engaged in any business in interstate commerce.

Validity of Contracts

Sec.47(b)(1) A contract that is made, or whose performance involves, a violation of this title, or of any rule, regulation, or order thereunder, is unenforceable by either party (or by a

nonparty to the contract who acquired a right under the contract with knowledge of the facts by reason of which the making or performance violated or would violate any provision of this title or of any rule, regulation, or order lthereunder) unless as court finds that under the circumstances enforcement would produce a more equitable result than nonenforcement and would not be inconsistent with the purposes of this title.

(3) This subsection shall not apply (A) to the lawful portion of a contract to the extent that it may be severed from the unlawlful portion of the contract, or (B) to preclude recovery against any person for unjust enrichment."

RULES COVERNING APPELLATE PRACTICE IN THE SUPREME COURT AND THE APPELLATE DIVISION OF THE SUPERIOR COURT OF THE STATE OF NEW JERSEY

R. 2:2-1 Appeals to the Supreme Court from Final Judgments * * *

(b) On Certification. Appeals may be taken to the Supreme Court from final judgments on certification to the Appellate Division pursuant to R. 2:12.

R.2:12-4. Crounds for Certification

Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in

other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division exceept for special reasons.(Emphasis supolied).

R.2:12-10. Granting or Denial of Certification

A petition for certification shall be granted on the affirmative vote of 3 or more justices. Upon final determination of a petition for certification, unless the Supreme Court otherwise orders, the clerk shall enter forthwith an order granting or denying the certification in accordance with the Supreme Court's determination and shall mail true copies thereof to the clerk of the court below and to the parties or their attorneys.

NEW JERSEY CIVIL PRACTICE RULES

R. 4:32-5. Derivative Action by

Shareholders

In an action to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may be properly asserted by it, the complaint shall be verified and allege that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share thereafter devolved on him by operation of law. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees, and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort. Immediately on filing the complaint and issuing the summons, the plaintiff shall give such notice of the pendency and object of the

action to the other shareholders as the court by order directs. The derivative action may not be maintained if it appears that the plaintiff does not fairly represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. R. 4:32-4 (dismissal and compromise) is applicable to actions brought under this rule. (Emphasis supplied).

R. 4:32-4. Dismissal or Compromise

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

R. 4:32-1. Requirements for Maintaining Class Action

(a) General Prerequisites to a Class

Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law and fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of paragraph (a) are satisfied, and in addition * * *

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; * * *

NEW JERSEY BUSINESS CORPORATE ACT

Sec. 14A:3-6. Provisions relating to actions by shareholders

(1) No action shall be brought in this State in the right of a domestic or foreign corporation unless the plaintiff was a holder of shares or of voting trust certificates therefor at the time of the transaction of which he complains, or his shares or voting trust certificates thereafter devolved upon him by operation of law from a person who was a holder at such time. * * *

(3) In any action now pending or hereafter instituted in the right of any such corporation by the holder or holders of less than 5% of the outstanding shares of any class or series of such corporation or of voting trust certificates therefor, unless the shares or voting trust certificates so held have a market value in excess of $25,000.00, the coporation in whose right such action

is brought shall be entitled at any time before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including fees of attorneys, that may be incurred by it in connection with such action or may be incurred by other parties named as defendant for which it may become legally liable. Market value shall be determined as of the date that the plaintiff institutes the action or, in the case of an intervener, as of the date that he becomes a party to the action. * * *

Statement of the Case

This is a spurious class action and derivative suit against Uniroyal, Inc. and all of its directors. The action was instituted in Bergen County, New Jersey by New York attorneys claiming to represent one Bernard Pogostin, a New York resident. Uniroyal does not do business in Bergen County. Its registered office is at Jersey City in Hudson County. The Bergen forum had been "shopped". The real purpose of the action is to enable Uniroyal to deliver releases to the defendant directors and to the CDU Group with respect to every imaginable wrong that was, or could have been, asserted in the complaint. The defendant directors are especially anxious to receive releases with respect to the payment by Uniroyal of $5,900,000 to one Carl Icahn as and for "greenmail". This payment had been authorized by them and constitutes waste and a breach of

fiduciary duty. The text of the releases is in the Appendix, R. 70a.

The defendants are also anxious to secure releases with respect to their violations of Section 7(a) of the Investment Company Act of 1940.

Alleging that Pogostin was "the owner of 8% non-cumulative First Preferred Stock $100 par value of Uniroyal", but omitting to state how many shares Pogostin actually owned or the value thereof, suit was filed on August 1, 1985 against Uniroyal only. Since the suit was a "friendly" one, no security for costs was required of Pogostin despite the strict provisions of New Jersey law, N.J. Business Corporate Act, Sec. 14A:3-6(3), supra, p.19.

Due to the collusive nature of the action, the defendants did not take Pogostin's deposition in order to ascertain which were the sources of his information about the transactions of

which he complained. Apparently, Pogostin had "advance knowledge" of the transactions which were first disclosed to all Uniroyal shareholders by means of a proxy statement dated August 28, 1985. Nor did Uniroyal answer the complaint. Rather, the defendants "worked with" Pogostin's New York counsel in order to avoid a confrontation over the proxy statement for the special meeting of Uniroyal's shareholders, including the Preferred shareholders that was to be held on September 23, 1985 and that was actually held on that date. The proxy statement was not amended before use to reflect the contents of the Memorandum of Understanding, dated September 9, 1985, between the parties. R. 59a.

The proxy statement omitted to state these material facts, among others :

(i) that Uniroyal would be liquidated and dissolved after a merger with CDU Holding, Inc., a Delaware corporation, as

in fact it was, (ii) that Uniroyal would have to be "busted up" in order to pay for the funds that were borrowed to finance CDU's takeover, as in fact happened,[1/] (iii) that CDU's[2/] projected profit from the transaction would be about $156,000,000, meaning that the five Uniroyal directors who are also CDU directors, Flannery, Barzelay, Beretta, York and Wentz, respondents-defendants here, would share in the bounty, and (iv) that the litigation would be settled and a class certified on consent in accordance with the Memorandum of Understanding, R.59a, of

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1/ A "bust-up" takeover is a situation in which one seeks to finance an acquisition by selling off pieces of the acquired company. Moran v. Household International, 500 A. 2d 1346, 1349 (Del. Sup., 1985). The bitter irony is that Wachtell Lipton Rosen & Katz, who had argued for a corporation's right to take measures against "bust-ups" in Household International reversed itself in Uniroyal by arguing that the business judgment rule allowed directors to agree to a "bust-up". Wachtell Lipton's "opinion letter" and its oral presentations to Uniroyal's board of directors are a part of the record below.

2/ Please see page 47.

September 9, 1985, as in fact it was. These transactions came to light in July, 1986 when another proxy statement, that dated June 27, 1986, was disseminated to Uniroyal's shareholders, including this petitioner. However on June 27, 1986, all of Uniroyal's common stock was owned and held by CDU, in violation of Section 7(a) of the 1940 Act. Thus, CDU was voting for the Plan in order to pave the way for realizing the $156,000,000 profit for itself.

When the Memorandum was signed in New York by the three attorneys, Pogostin's, Uniroyal's and CDU's, the collusion between them had entered a new phase. The Memorandum sealed the fate of those Preferred shareholders who had been designated as "members of the class" and those who had not been so designated, i.e. the hundreds of new shareholders buying the Preferred on the N.Y.S.E.

without any knowledge of these transactions. No public announcement was made concerning the rights of the members and nonmembers of the putative class. The Memorandum guaranteed a $600,000 fee to Pogostin's New York attorneys and a $150,000 fee to Pogostin's "expert". It provided for the filing of an amended complaint and for Pogostin's waiver of his fiduciary duty to seek preliminary and permanent injunctive relief against the merger.

With the trial judge's tacit consent, the three attorneys thereafter used Pogostin's suit as a vehicle to deprive past, present and future Preferred shareholders of their rights under federal securities laws. The bitter irony was and continues to be that in M.J. Whitman & Co., Inc. v. American Financial Enterprises et al., 725 F. 2d 394 (C.A. 6, 1984), Pogostin's attorneys

and "expert" had sought to enforce certain provisions of the 1940 Act against the defendants in that case. Having learned their lesson, Pogostin's New York attorneys now deemed it safer and more profitable to settle by agreeing to the terms of the Memorandum. Even though the Memorandum had been signed by an attorney for CDU, the amended and supplemental complaint, which was filed on October 3, 1985, did not add CDU as a party. It did add all of Uniroyal's directors as parties, even though they were never served with process.

On October 11, 1985, the trial court signed a consent order (also consented to by CDU,)appointing Pogostin as class representative "for purposes of settlement only" and as derivative plaintiff for the purpose of "enforcing the rights of the corporation." The conflict of interest that is inherent in such an appointment has been recognized

in Harff v. Kerkorian, Del.Ch., 324 A. 2d 215.

Without requiring Pogostin to post security, the trial court also stayed and enjoined the "institution, maintenance or prosecution of any and all actions by any person arising out of or relating to the subject matter of the pleadings". No notice of this stay and injunction was served on Preferred shareholders.

Like hundreds of other persons, petitioner became a Preferred shareholder of record on November 18, 1985 following purchase of his stock on the N.Y.S.E. Petitioner filed timely objections to the settlement.

The "fairness" hearing of November 21, 1985 was anything but fair. In a tense atmosphere, the trial court excoriated petitioner for having dared to file objections. The court showed a complete lack of familiarity with federal securities laws and S.E.C. rules and

regulations. The thrust of petitioner's objections was that (i) the merger would violate Section 7(a) of the Investment Company Act of 1940; (ii) the releases would cover a broad range of actual or imaginary claims made on behalf of Pogostin in order to suit the needs of the defendants for protection from liability; (iii) releases would be delivered by Uniroyal to CDU, a nonparty to the action, and an otherwise indispensable party; (iv) Uniroyal would release all of its defendant directors from liability with respect to a $5,900,000 payment made to one Carl Icahn for "expenses" allegedly incurred by Icahn in an attempt to take over Uniroyal before CDU emerged as a "white knight". Uniroyal's proposed release is in the appendix, R.70a . The hearing ended with the trial court's oral opinion, R. 1a - 9a. The court opined

that "this is not the case to make law", R.8a. On appeal, it took three months after oral argument for the Appellate Division to make law and review a record which had closed eleven months earlier, R. 19a. Supervening events were ignored, such as the adoption of the Plan of Liquidation and Dissolution in July, 1986 and the conviction of the attorney who had masterminded the Uniroyal-CDU merger in October, 1986, on charges of insider trading in violation of federal securites laws. The attorney, Ilan K. Reich, was disbarred in May, 1987 by order of the Appellate Division, First Department of the New York State Supreme Court. R.73a.

The Appellate Division did not even reach the merits of the objections that had been presented below by petitioner. The thrust of its opinion was the standing of petitioner to object, R.35a ff. Equating petitioner's position with that of a plaintiff filing a derivative

suit, the Appellate Division determined that, under New Jersey law, petitioner had no standing to object because he would not have had standing to sue derivatively on the subject matter of the objections. Thus, New Jersey law bars objections based on federal law and sanctions the violations of the latter on a novel theory of standing.

Since everybody else has been barred by the trial court from raising the federal questions in separate proceedings R. 15a - 16a, it follows that the respondents have secured for themselves protection from the reach of federal law for the relatively small sum of $750,000 payable out of Uniroyal's corporate treasury.

A motion for reconsideration was denied, R. 54a. A petition for certification of the judgment of the Appellate Division was denied by the

Supreme Court of New Jersey, R. 56a.

Meanwhile, the Appellate Division has taxed costs against petitioner, R. 55a, and has denied a motion to reconsider the costs issue, R. 58a. Thus, the judgment of the Appellate Division is final under New Jersey law.

When and How the Federal Questions were Raised Below

The federal questions were initially submitted in writing to the trial court prior to the "fairness" hearing of November 21, 1985. They were superficially passed upon by that court, R.4a.

The Appellate Divison did not specifically rule on the federal questions, which were fully presented in the opening and answering briefs, R. 52a.

The Supreme Court of New Jersey did not write an opinion, R. 56a. upon denying certification. The federal questions were presented in the petition for certification (i.e. the application for leave to appeal from the Appellate Division's decision).

This petition for certiorari followed.

Reasons for the Allowance of the Writ

1. The power to enforce Article VI, Section 2 of the Constitution of the United States rests solely and exclusively with this Court. The New Jersey judges' manifest disregard for their duties under Article VI requires the intervention of this Court, twenty-one months after appeal proceedings were commenced below. Section 7(a) of the Investment Company Act of 1940 overrides all New Jersey statutes that were or could have been supportive of the Uniroyal-CDU merger regardless of when the merger was conceived or carried to fruition. The viability of Section 7(a) does not depend on whether petitioner was a First Preferred shareholder at the time the merger was conceived or carried out.

It is not the purpose of this petition to urge this Court to decide, in the first instance, the federal questions

presented below. Nor is the purpose of this petition to urge this Court to make findings of fact that were not made below.

2. In the recent past, this Court, has twice granted certiorari to resolve questions arising under the Investment Company Act of 1940. Daily Income Fund v. Fox, 464 U.S. 523, (1984) and Weiss v. Temporary Investment Fund, 465 U.S. 1001 (1984). The issues presented by the case at bar surpass in importance the issues decided in Daily Income Fund and Weiss. The result reached below emasculates the purposes of the Investment Company Act of 1940, American Financial Enterprises, supra. The Appellate Division should have decided issues arising under the 1940 Act, as presented to it by this petitioner, just as the Sixth Circuit has done in American Financial Enterprises.

3. The New Jersey courts have denied this petitioner the Equal Protection of the Laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Thus, the Appellate Division has gone to great lengths into petitioner's standing to be heard on the merits, citing N.J.S.A. 14A:3-6(1). The Appellate Division has not determined in any way the standing of the plaintiff Pogostin to bring suit, derivatively, on behalf of Uniroyal, N.J.S.A. 14A:3-6(3) and, representatively, on behalf of an alleged class, R.4:32-1.

In the first place, there is a basic conflict of interest in the position taken by Pogostin, Harff v. Kerkorian, Del. Ch., 324 A. 2d 315, which should have been resolved below in accordance with New Jersey law.

In the second place, Pogostin could have had standing to sue

derivatively without posting security only if his holdings of Uniroyal First Preferred stock had a market value exceeding $25,000.00 on August 1, 1985. No determination of Pogostin's compliance with the statute was made by the finder of facts, the Appellate Divison. No findings of fact on this or on any other issue have been made at the trial court level because the defendants' attorneys, acting in collusion with plaintiffs' attorneys, have not answered the complaint,nor the amended complaint, nor moved for security as required by 14A:3-6(3).

In short, whereas the Appellate Division has expanded the meaning of 14A:3-6 as if petitioner had been the plaintiff below, it has disregarded the same statute when it came to determine Pogostin's standing to sue. Therein lies the unconstitutional discrimination against petitioner.

4. This Court is the ultimate guardian of Federal rights against their usurpation by the State courts. Where such usurpation is shown, as here, certiorari is the proper remedy.

The defendants' and the plaintiff's attorneys have combined, conspired and agreed with attorneys for CDU to deprive First Preferred shareholders of their rights under Federal laws. The memorandum of understanding, R. 67a, signed by these attorneys, has specifically provided for an injunction against the commencement of any action by any such shareholder in any court other than the Bergen County Chancery Court of New Jersey. That court is forum non conveniens for any shareholder other than one residing in Bergen County. It is precisely in order to prevent such injunctions and bar that the Federal securities laws have expressly provided that suits for the

purpose of their enforcement may be brought in any forum where the defendants may be found or may be doing business. Since these attorneys' private interests conflict with these Federal laws, they have agreed to the terms of the memorandum. As a result, the order and final judgment (prepared by them) permanently barred and enjoined "all persons ... who participate in the settlement", R.16a, from "instituting, and prosecuting any individual or class claims or any derivative claims on behalf of Uniroyal". The Appellate Divison concurred, R. 20a.

One of the basic rights of shareholders of target companies is that recognized by the decision in American Financial Enterprises, supra. While this Court has not yet had an opportunity to review that decision, the Appellate Division should be directed to consider and act in accordance with it, or to

state its reasons for not doing so.

Petitioner did extensively brief that decision and did urge the Appellate Division to act in accordance with it, as required by Article VI, Section 2. On the combined pleas of the defendants and the plaintiff, the Appellate Division has failed to do so. Therefore the costs of seeking and obtaining certiorari should be assessed against these parties.

5. The Uniroyal-CDU merger is the brainchild of a convict, Ilan K. Reich, a disbarred attorney now serving a prison sentence for peddling inside information with respect to other mergers and/or acquisitions.

The record shows that, in 1985, Reich has twice addressed Uniroyal's board of directors and has reviewed in detail the August 28, 1985 proxy statement. Reich's law firm has issued an "opinion letter" dated July 22, 1985, one week before the instant suit was filed by

attorneys for Pogostin. Since all of these documents were marked "confidential", the inference is plain that Reich may have "leaked" the information to Pogostin's attorneys in order to assist them in formulating the original complaint. This paved the way for drafting the releases which may be issued by Uniroyal if this certiorari proceeding fails.

Thus, the question squarely facing this Court is whether such machinations in a State court should be permitted in order to defeat the purposes of Federal securities laws.

The matter was twice brought to the attention of the Appellate Division, by motions for reconsideration, R. 54a, 58a, and to the attention of the Supreme Court of New Jersey, by petition for certification, R.56a. No action was taken by either court. A copy of the disbarment order is in the appendix, R. 72a.

6. This is a sordid case. It involves the promise of a payoff of $600,000 to Pogostin's attorneys after only thirty-nine days of litigation (August 1, 1985 - September 9, 1985, the date of the Memorandum of Understanding) in exchange for a promise to deliver releases to parties and nonparties. The releases would absolve the defendants from liability for serious breaches of fiduciary duty, see e.g. Feinberg v. Carter, 652 F. Supp. 1066 (S.D.N.Y., 1987).

It involves the promise of a payment of $150,000 to Pogostin's "expert" for hardly any work at all. The $150,000 is obviously a slush fund to be used to pay bribes to third parties. Under less serious circumstances, the Federal Government has deemed it proper to proceed by indictment, e.g. U.S.A. v. Matthews, 787 F.2d 38 (C.A. 2, 1986).

It involves the disqualification,

for the purposes of this case, of a law firm, Wachtell Lipton Rosen & Katz, that has acted through one of its partners, Ilan Reich, now disbarred by order of a New York State appellate court. See U.S.A. v. Standard Oil Co., 136 F. Supp. 345, 350 (S.D.N.Y., 1955). Reich was indicted and convicted for insider trading, mail fraud and conspiracy in two other stocks (G.D. Searle and SFN Companies). No one has asked him whether he has also traded in the Uniroyal First Preferred which, on May 6, 1985, was trading at around $53 per share. It is being redeemed in liquidation at $100 per share, and there were 611,411 shares outstanding on August 1, 1985.

The New Jersey courts have turned deaf ears to this petitioner's pleas for equity and have imposed costs at both appellate levels. They have ignored reality, namely, that the Plan of Liquidation and Dissolution of Uniroyal,

adopted in July, 1986, has mooted Pogostin's suit. When the issues in a suit have been mooted by the actions of the parties, the settlement must be rejected, Chickering v. Giles, Del. Ch. 270 A.2d 373 (1970). The New Jersey courts have refused to take notice of the Plan and their decisions rest on a record that ends in November, 1985.

The Plan has not mooted the defendants' violations of Section 7(a) of the 1940 Act. That violation continues to this day and adversely affects and aggrieves all First Preferred shareholders whose rights under Federal laws have been trampled by CDU. These shareholders were, (or thought they were) beneficiaries of a judgment which assured them of ten years' cumulative dividends of $8.00 per share. Gradual redemption of the First Preferred was to begin in September, 1995, R. 60a. The liquidation and dissolution was not

mentioned to the trial judge in November, 1985. R. 1a - 9a. The shareholders' loss (and CDU's gain) is $44,002,152 (9 years' dividends (1987-1995) x $8.00 per share x 611,141 shares outstanding = $44,002,152). Uniroyal has paid the $8.00 dividend in 1986.

The New Jersey courts have refused to disqualify an attorney for Pogostin, Sidney B. Silverman, who had been disciplined by the U.S.D.C., S.D.N.Y. in another case where he had filed groundless claims, Andre v. M.L.P.F. & S., 97 F.R.D. 699 (S.D.N.Y.). The disqualification motion was submitted to the New Jersey Supreme Court which denied relief, R. 57a.

Conclusion

Petitioner is personally aggrieved and adversely affected by the imposition of costs upon him at both appellate levels below in a case that has become moot by the actions of the original

parties. As a current First Preferred shareholder (who has not tendered his shares for redemption), petitioner is aggrieved by the abandonment of the settlement terms which appeared fair at the time of the "fairness" hearing. No dividends have been paid on petitioner's First Preferred stock since December, 1986 and none will be paid in the future.

All of this is due to CDU's actions in violation of Section 7(a) of the 1940 Act which petitioner cannot challenge in other forums by virtue of the injunction issued by the Bergen County Chancery Court, as affirmed by the Appellate Division. This brazen violation of Federal law requires the intervention of this Court, for which reason certiorari should be granted.

Respectfully submitted :

William Leighton

William Leighton

Petitioner

2/ CDU is a "shell" corporation whose sole business purpose was and is to own and hold Uniroyal common stock. CDU has not registered as an investment company in accordance with the requirements of the Investment Company Act of 1940 but is engaged in business in violation of Section 7(a) thereof.

By using the August 28, 1985 proxy statement, CDU has succeeded in persuading Uniroyal's common shareholders to sell it 12,000,000 common shares at $22 per share. In liquidation and dissolution, these shares are worth $35, the projected profit being $156,000,000 (12,000,000 x $13). The liquidation and disssolution was not disclosed in the August 28, 1985 proxy statement. It was set forth at length in the June 27, 1986 proxy statement, the latter being addressed primarily to itself because CDU then controlled most, if not all, of Uniroyal's common shares.

The Appellate Division has refused to acknowledge the existence of either document. Contra, Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM LEIGHTON,

Petitioner, Objector-Appellant below,

vs.

UNIROYAL, Inc. et al.,

Respondents, Defendants-Appellees below,

and

BERNARD POGOSTIN,

Respondent, Plaintiff-Appellee below

APPENDIX

ON PETITION FOR CERTIORARI TO

THE SUPREME COURT OF NEW JERSEY

William Leighton

Petitioner

249 West 11th Street

New York, N.Y., 10014

(212)255-0001

October, 1987

Date	CONTENTS OF APPENDIX	Page No.
1985		
Nov.21	Oral Opinion, Chancery Court, Bergen County, (Sherwin D. Lester, JSC)	1a
Nov.21	Order and Final Judgment (docketed, Jan. 2, 1986)	10a
1986		
Dec.26	Order, Appellate Division denying leave to file a supplemental brief and appendix	18Aa
1987		
Jan.29	Opinion, Appellate Division, dismissing appeal	19a
Mar.12	Order, Appellate Division, denying motion for reconsideration	54a
Jun.15	Order, Appellate Division, taxing costs against Leighton	55a
Jul.09	Order, Supreme Court of New Jersey denying petition for certification, with costs	56a

Jul.09 Order, Supreme Court of New Jersey denying motion to disqualify respondent's counsel 57a

Sep.10 Order, Appellate Division denying reconsideration of order imposing costs 58a

Other materials

Memorandum of Understanding dated September 9, 1985 59a

Release, to be delivered by Uniroyal,Inc. to all defendants and the CDU Group 70a

Order, Appellate Division First Judicial Department, New York State Supreme Court disbarring Ilan Reich dated May 28, 1987 73a

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION - BERGEN COUNTY

Docket No. C-4115-85E

November 21, 1985

Hackensack, New Jersey

Bernard Pogostin,

Plaintiff,

vs.

Uniroyal, Inc., Ross Barzelay, David Beretta, Norborne Berkeley, Jr., E. Paul Casey, Frederick Colombo, E. Raymond Corey, Joseph P. Flannery, Allen J. Krowe, Horace G. McDonnell, Jr., Burnell R. Roberts, Howard B. Wentz, Jr., and W. Thomas York,

Defendants.

BEFORE : The Honorable Sherwin D. Lester, J.S.C.

* * * * * * *

THE COURT : Mr. Stover impressed the Court, but they militate, in the Court's

mind, toward granting the application. Mr. Stover was the holder of preferred stock which was selling at thirty or forty dollars per share and by virtue of the proposed takeover, leverage buy-out or the like, would have been sold probably and the value of his stock would have been subject to the one billion dollars, approximately, debt of the corporation which would have reduced its security value.

There would have been no right to tender and there would have been no rights over the -- either ten years or a thousand years and he would have been stuck with stock worth whatever it was selling for then.

It was because of individuals such as Mr. Stover that I listened carefully and went through the papers caarefully with respect to the proposed settlement.

I will direct my comments, as the

law requires, to the fairness and the reasonableness of the settlement and relate them also to Mr. Stover's individual case.

With respect to both, I find them -- I find this proposed settlement fair and reasonable.

With respect to Mr. Stover, I find it an affirmative plus from that which would have happened had there been no lawsuit here by Mr. Klinger's clients.

Second, the finding of the Court, aside from the legalistic requirement of being fair and reasonable, is made also on the basis of common sense, business judgment, logic, considering the history of the corporate actions in the last many months outlined in the pleadings and stated on the record, and I have taken into consideration all those elements which any judge must take into

consideration in approving a settlement.

There is no question that it is both fair, reasonable and meets all the requirements of common sense and business judgment which issues are presented before me.

I find that all parties were adequately represented. I find that there was jurisdiction. And I find that there has been no violation - at least on any facts presented before me -- of any S.E.C. regulations or any statutory matter, statutory statement.

The suggestion by the holder of five percent of the -- five shares preferred -- that a receiver be appointed at this date as outlined in Mr. Leighton's letter of November 6th, is illogical. And I find that he raises no questions, nor does Mr. Stover, of course, raise any questions which cause

the Court to hesitate much less rule contrary to the proposed settlement.

Any questions which were raised by Mr. Leighton in his letters of November 6th and 7th have been more than adequately answered in the papers filed by and the statements made by Mr. Klinger and Mr. Szuch.

The two documents filed today entitled : "Objector's response" et cetera, and "Objector's response to plaintiff's affidavit", the two documents by way of response filed, contain little if anything that is new.The memoranda opinion are inapposite with respect to these conclusionary findings.

And I find as a matter of fact that the proposed settlement is in the best interests of the preferred shareholders under all of the circumstances and if I may use latin, something I tried to

avoid, a fortiori, Mr. Stover.

I have, in addition to my reasoned conclusion that the application and the settlement will be approved and the settlement confirmed, not touched upon issues which I deem real issues ; one the status of Mr. Leighton in this litigation; two, the status of Mr. Leighton in any litigation against the Board of Directors or the corporation by way of derivative action, considering the date of acquisition of his shares and the number of shares.

The history of the law, corporate law is full of situations where corporate action is challenged by minority shareholders, but we have nothing new here.

I do not pass upon the motivation or the motives of Mr. Leighton. Every individual has a right under the law to do that which he thinks appropriate under

the law, and assuming no specific motivation that is unlawful or illegal or immoral, one must meet as a judge, the responsibilities of a judge in ruling upon the papers presented.

As I say, his actions are quixotic. He is taking on a cudgel to be the champion of a class without being requested so to do. The saga of Don Quixote is not always a happy one and one must leave to history here and fiction to determine whether Quixote's actions were appropriate or not.

This is a trial court. One can only rule in accordance with the law and in accordance with the documents and facts presented and the law as I see it. I'm not sure I would want to change the law if it were bad. I may agree with Mr. Leighton in general that there have been too many takeovers, attempts to takeover

and too much litigation, but this is the wrong case.

One of the reasons I stepped off the bench before I gave this decision was to determine whether I would write a more formal opinion because it is a field that is an open one for those who want to make law.

A court always likes to make law. But one takes that standard in hand and wants to charge ahead, one likes to know that he has a good vehicle with which to move. This is not the case.

Here there is no question in the Court's mind as to the appropriateness of the settlement and an order in accordance with the moving papers will be submitted.

I have not heard argument with respect to counsel fees. Counsel fees will be left open in the order. If there are any objections as to quantum, I will

hear them. I want objections in writing by tomorrow. I will sign the order tomorrow afternoon or today, subject to counsel fees, as you please. Anything else I can do, Mr. Szuch ?

MR. SZUCH : No, Your Honor, I think the issue of counsel fees is one that's solely within your discretion. We're not going to take a position on it and we're not going to oppose it.

THE COURT : I didn't ask for any comments, I just said if anyone had any comments.

MR. SZUCH: No. * * *

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION - BERGEN COUNTY

Docket No. C-4115-85E

Civil Action

Bernard Pogostin,

Plaintiff,

vs.

Uniroyal, Inc., Ross Barzelay, David Beretta, Norborne Berkeley, Jr., E. Paul Casey, Frederick Colombo, E. Raymond Corey, Joseph P. Flannery, Allen J. Krowe, Horace G. McDonnell, Jr., Burnell R. Roberts, Howard B. Wentz, Jr., and W. Thomas York,

Defendants.

ORDER AND FINAL JUDGMENT

No. J. 97-86, filed Nov. 21, 1985,

Docketed, Jan. 2, 1986

A hearing been held before this Court in the above-captioned action (the "Action") on November 21, 1985, pursuant to this Court's Order of October 11, 1985, upon a Stipulation of Settlement of the Action dated October 4, 1985 (the "Settlement Stipulation"); it appearing that due notice and publication of the hearing were given in accordance with the October 11, 1985 Order); the Court having determined that notice to the First Preferred Stockholders of UNIROYAL, Inc. ("Uniroyal") was adequate and sufficient; the respective parties having appeared by their attorneys of record; the Court having heard and considered evidence in support of the proposed settlement of this action (the "Settlement"); the attorneys for the respective parties having been heard; an opportunity to be heard having been given to all other

persons requesting to be heard in accordance with the Court's October 11, 1985 Order; and the entire matter of the proposed settlement having been heard and considered by the Court;

IT IS on this 21st day of November, 1985 ORDERED as follows :

1. On October 16, 1985, the Notice of Pendency of Class Action and Proposed Settlement and Notice of the proposed Dismissal and Compromise of Derivative Claims (the "Shareholder Notice") was mailed to all persons who were record holders of Uniroyal First Preferred stock as of the close of business on May 6, 1985 (the"Class") and to all persons who were record holders of Uniroyal First Preferred stock as of the close of business on September 30, 1985, with a request that record holders forward the Shareholder Notice to their beneficial owners. A short form of the Shareholder

Notice appeared in the Bergen Record and The Wall Street Journal on October 20 and 21, 1985, respectively.

2. The form and manner of notice given is hereby determined the best possible notice under the circumstances and in full compliance with Rule 4:32-4 of the Rules Governing the Courts of the State of New Jersey.

3. The Settlement Stipulation is hereby approved and confirmed as being fair, reasonable and adequate. The parties hereto are hereby directed to consummate the Settlement in accordance with the terms set forth in the Settlement Stipulation. The Clerk of the Court is hereby directed to enter and docket this Order and Final Judgment.

4. This Order and Final Judgment shall not constitute any evidence against or admission by any defendant hereto that any acts of wrongdoing have been

committed and shall not be deemed to create any inference that there is any liability therefor. The defendants to this Action do not admit either expressly or impliedly that any of them are subject to any liabaility whatsoever by reason of any of the matters complained of in this Action; said defendants on the contrary expressly deny and dispute the existence of any such liability.

5. The complaint as amended in this Action is dismissed on the merits and with prejudice and without costs as to all parties, and all defendants are hereby discharged from any and all claims and liability that are or could have been asserted in the Action in connection with, that arise now out of, or in any way relate to the Action, or any of the matters, transactions or occurences referred to in the Action, including

without limitation, all claims of any type relating to the merger ("the Merger") by and among CDU Holding, Inc. ("Holding"), CDU Acquisition, Inc. (a corporation wholly owned by Holding) and Uniroyal; the restructuring of Uniroyal described in the August 28, 1985 proxy statement sent to Uniroyal shareholders (the "Restructuring"); and the disclosure made with respect to the Merger and Restructuring (all of which are hereinafter referred to as the "Settled Claims"). This Judgment shall be final and conclusive with respect thereto.

6. The plaintiff, (either individually, representatively or in any other capacity), the Class, and their respective heirs, executors, agents, personal administrators, personal representatives, successors and assigns, Uniroyal and its subsidiaries, affiliates, officers, directors,

attorneys, agents, investment bankers, shareholders, employees, successors and assigns, and all persons, firms and corporations who Participate in the Settlement are hereby permanently enjoined and barred from instituting or prosecuting any individual or class claims or any derivative claims on behalf of Uniroyal or other proceedings in any court of this or any other jurisdiction based upon or for the purpose of enforcing any of the Settled Claims, all of which claims or rights are hereby declared to be compromised, settled and extinguished by virtue of the proceedings in this Action and this Judgment.

7. The plaintiff is hereby awarded attorneys' fees and expenses in the amount of $600,000 (exclusive of a fee of $150,000 payable by Uniroyal to M.J. Whitman & Co., Inc.), to be paid by

Uniroyal no later than five (5) business days after the earlier of (a) the time the Amendments (as defined in the Settlement Stipulation) are voted upon or (b) the later of (i) the time that this Order and Final Judgment has been entered and finally affirmed on appeal, and (ii) the expiration of the time for noticing an appeal from the entry of this Order and Final Judgment without any appeal having been taken in the Action.

8. This Court reserves jurisdiction (a) over all matters relating to the administration, consummation and enforcement of the Settlement Stipulation and the terms of this Order and Final Judgment, including the resolution of any disputes that may arise with respect to the effectuation of any of the provisions of the Settlement Stipulation, and (b) for the entry of further orders as may be necessary or

appopriate in administering and implementing the terms of the Settlement Stipulation and this Order and Final Judgment. /s/ Sherwin D. Lester, J.S.C.

DATED : November 21st, 1985.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Docket No. A-2522-85T6

ORDER ON MOTION

This matter having been duly presented to the Court, it is this 23rd day of December, 1986, hereby ordered as follows :

Motion by appellant William Leighton for leave to file a supplemental brief and appendix - Denied.

For the Court :

/s/ Herman D. Michels, P.J.A.D.

Filed :

December 26, 1986

Appellate Division

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-2522-85T6

Bernard Pogostin,

Plaintiff-Respondent,

and

Uniroyal, Inc., Ross Barzelay, David Beretta,Norborne Berkeley, Jr., E. Paul Casey,Frederick Colombo, E. Raymond Corey, Joseph P. Flannery, Allen J. Krowe, Horace G. McDonnell, Jr., Burnell R.Roberts, Howard B. Wentz, Jr., and W. Thomas York,

Defendants-Respondents

vs.

William Leighton, Objector-Appellant.

- -

Argued, October 28, 1986 -- Decided Januaray 29. 1987 -- Original filed : January 29, 1987

Before Judges Michels, O'Brien and Skillman.

The opinion of the court was delivered by

MICHELS, P.J.A.D. 523 A.2d 1078, 216 N.J. Sup. 363

Objector William Leighton appeals from a final judgment of the Chancery Division which, in part : (1) approved a settlement agreement concerning the merger and restructuring of defendant Uniroyal, Inc. (Uniroyal) and a class action and derivative suit instituted by plaintiff Bernard Pogostin; (2) permanently enjoined plaintiff and other interested parties from instituting an action on any of the claims extinguished by the settlement agreement, and (3) awarded plaintiff $600,000 attorneys fees, exclusive of $150,000 to be paid by Uniroyal to plaintiff's investment banker.

The chronology of events underlying

this litigation is not in dispute. Uniroyal, Inc., a New Jersey corporation with its principal place of business in Middlebury, Connecticut, manufactures and markets chemical, rubber and plastic products for transportation, industry, agriculture and the home. At the time this action was commenced, Uniroyal had two outstanding classes of stock: common and first preferred. The first preferred stock had a par value and liquidation preference of $100, and a non-cumulative 8% dividend preference. On April 15, 1985, Robin Acquisition Corp., a company controlled by Uniroyal shareholder Carl Icahn (Icahn), commenced a tender offer for approximately 53% of the outstanding Uniroyal common stock at $18 per share. Under Icahn's plan, common stock not acquired in the tender offer would ultimately be exchanged for undetermined

debt securities having a purported value of $18 per share Icahn did not offer to acquire any of the first preferred shares.

As the book value of Uniroyal common stock exceeded $18 per share at that time, the Uniroyal Board of Directors unanimously rejected Icahn's proposal. Efforts to find a better deal for Uniroyal shareholders resulted in a single offer made by Clayton & Dubilier, Inc. (C&D). The offer was to merge an entity called CDU Acquisition, Inc. (Acquisition) into Uniroyal. All Uniroyal common stock would be "cashed out" at $22 per share and each share of Acquisition common stock would be converted into one share of common stock in the surviving corporation, Uniroyal. Funds to accomplish the merger would be obtained by floating approximatelly $950 million in debt securities. Upon

consummation of the merger, Uniroyal's common stock would be entirely owned by CDU Holding,Inc (Holding), Acquisition's parent company.

Shares of Uniroyal first preferred would remain issued and outstanding. Moreover, there was to be a new issue of approximately $26 million of Uniroyal second preferred stock, the rights of which would be subordinate to the rights of Uniroyal first preferred stock. C&D or its affiliates would purchase this new issue in its entirety.

To facilitate the transaction, on May 6, 1985, Uniroyal entered into an agreement with Icahn whereby he promised to terminate his offer and to support the one proposed by C&D. In consideration thereof, Uniroyal agreed to reimburse Icahn $5.9 million of the expenses he

incurred in making his tender offer. On this same day, May 6, 1985, Uniroyal's Board of Directors and C&D signed the merger agreement. A special meeting of Uniroyal's stockholders was scheduled for September 23, 1985 for the stockholders to vote on the proposoed merger and also on certain amendments to Uniroyal's charter and by-laws.

On August 1, 1985, plaintiff, a holder of first preferred stock, filed suit against Uniroyal individually and on behalf of other first preferred stockholders. One of the allegations in the complaint was that the proposed merger amounted to a plan of liquidation, thus triggering the liquidation rights of the holders of first preferred stock. Accordingly, plaintiff sought, among other things, a mandatory injunction requiring Uniroyal to redeem the shares of first preferred, a temporary

injunction against Uniroyal's proceeding with the merger and a declaratory judgment determining the rights of the first preferred shares.

In light of the shareholders' meeting scheduled for September 23, 1985, the parties had expedited discovery and engaged in settlement negeotiations. These efforts culminated in the parties' signing on September 9, 1985 a Memorandum of Understanding outlining the general terms of a settlement. The principal terms of this document were embodied in a formal Settlement Stipulation on October 4, 1985. The proposed merger and the charter and by-law revisions were in fact approved at the September 23, 1985 meetings of Uniroyal's shareholders.

Pursuant to the September 9, 1985 Memorandum of Understanding, on October

3, 1985, plaintiff filed an amended complaint adding the individual Uniroyal directors as defendants and asserting derivative as well as class claims. Some of the charges made therein were that: (1) the merger was in violation of Uniroyal's by-laws; (2) the payment of certain costs in connection with the merger and restructuring and a bonus to defendant Flannery constituted a breach of fiduciary duty and a waste of corporate assets, and (3) the proxy materials for Uniroyal's September 23, 1985 shareholders' meeting contained material misstatements and omissions in violation of New Jersey law.

On October 3, 1985, the trial court signed a consent order which (1) established a schedule of proceedings for a hearing on the proposed compromise contemplated by the parties; (2) set out

the form of notice to be sent to the holders of first preferred stock and (3) established October 11, 1985 as the date for a hearing for the purpose of approving the manner of notice to be given to the holders of Uniroyal first preferred stock and the procedures to be followed by first preferred shareholders who desired to object to the compromise. The trial court entered another order on Cctober 11, 1985 to help bring the proposed settlement to fruition. For purposes of settlement only, the order certified the action as a class action, the class being defined as all beneficial owners of Uniroyal first preferred stock as of May 6, 1985. The trial court found that plaintiff would fairly represent the interests of all those similarly situated and thus designated him class representative. Additionally, the order

directed Uniroyal to mail to all current record holders of Uniroyal first preferred stock and to all record holders of Uniroyal preferred stock as of May 6, 1985 notice, explaining : (1) certain background information, including The Icahn tender offer and the C&D merger; (2) the action instituted by plaintiff; (3) the terms of the Settlement Stipulation, and (4) other relevant information contsained in the October 11, 1985 order. Uniroyal was similarly ordered to publish a short-form notice of the proposed settlement in The Wall Street Journal and the Bergen Record. The order also enjoined the institution, maintenance or prosecution of any action as to matters pertinent to the Settlement Stipulation. Additionally, the order stated that, upon providing timely notification, any person objecting to

the proposed settlement "or who otherwise wishes to be heard" may attend a hearing scheduled for November 21, 1985. As stated in the order, the purpose of this hearing was to determine:

(i) the fairness, reasonableness and adequacy of the agreement of settlement and compromise provided for in the Settlement Stipulation, and

(ii) whether a final judgment and order should be entered approving the proposed settlement and compromise and dismissing the action against Uniroyal and the Director Defendants as provided for in the Settlement Stipulation, and to pass on the fee application of plaintiff's counsel in an amount not to exceed $600,000 inclusive of disbursements.

On October 16, 1985, Uniroyal mailed the requisite notice to the first preferred shareholders and on October 20 and 21, 1985 complied with the

the requirements of publication notice. "(T)he only one that object(ed) to this billion dollar transaction" was Leighton. In a letter dated November 6, 1985, Leighton identified himself as a person "who otherwise wishes to be heard" and set forth reasons why he believed the settlement should be rejected. Leighton owns five shares of Uniroyal first preferred stock. According to the records of Uniroyal's transfer agent and by Leighton's own admission, these five shares were issued to Leighton on November 18, 1985 and were probably purchased by him two to three days earlier.

At the conclusion of the November 21, 1985 hearing, the trial court found the "proposed settlement fair and reasonable" and "in the best interests of the preferred shareholders under all of the circumstances." Specifically, the

trial court noted the benefits of the settlement vis-a-vis a first preferred shareholder who wanted to sell his shares before redemption would commence in 1995. It observed that at the time the leveraged buy-out was proposed, first preferred stock was selling at $30 or $40, would have been subordinate to a debt of almost $1 billion due to the merger, and had no rights of redemption. The trial court further noted that in the wake of the proposed settlement, "the market (for first preferred stock) ha(d) risen to seventy-two dollars a share."

The trial court also found that all parties were adequately represented, that it had jurisdiction, and that the settlement was not violative of any statute or S.E.C. regulation. Finally, it determined that Leighton's suggestion of appointing a receiver was illogical, and

that the documents Leighton filed with the court on the hearing day contained "little if anything that is new." The trial court thereupon signed the judgment on November 21, 1985. The judgment, however, was not entered on the docket until January 2, 1986. The delay in docketing apparently was due to a backlog at the Clerk's office in entering orders on the computer. On February 3, 1986, Leighton filed this appeal.

I.

Timeliness of the Appeal

The judgment under review was signed by the trial court on November 21, 1985. However, as noted above, clerical delays postponed the entry of the judgment until January 2, 1986. Leighton filed his notice of appeal with this court on February 3, 1986, over two months after the judgment was signed but

only about 30 days after it was docketed. We must determine if, under our rules of court, this appeal was timely.

The rules governing the timeliness of an appeal are R. 2:4-1(a) and R.4:47. R.2:4-1(a) provides:

> Appeals from final judgments of courts, final judgments or orders of judges sitting as statutory agents and final judgments of the Division of Workers' Compensation shall be taken within 45 days of their entry.

R.4:47 provides :

> Subject to the provisions of R. 4:42-2 (judgment on multiple claims) judgment shall be entered as follows :
>
> (a) Unless the court otherwise orders, the clerk shall forthwith prepare, sign and enter the judgment without awaiting further direction by the court; (1) upon a general verdict of a jury; (2) upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, and (3) upon a special verdict or general verdict accompanied by answers to interrogatories which is forthwith convertible by the court into a money judgment or a judgment that relief shall be denied.
>
> (b)Where the decision of the court grants other than monetary relief, or is

reserved or where a special verdict or a general verdict accompanied by answers to interrogatories is not convertible pursuant to paragraph (a), the court shall promptly approve the form of judgment and the clerk of the court shall enter it.

The notation of a judgment in the civil judgment and order docket constitutes the entry of the judgment, and the judgment shall not take effect before such entry unless the court in the judgment shall, for reasons specified therein, direct that it take effect from the time it is signed, but no such direction shall affect the lien or priority of the judgment. The entry of judgment shall not be delayed for the taxation of costs.

These provisions establish the framework in which to analyze the timeliness of Leighton's appeal. R. 2:4-1(a) directs that an appeal from a final judgment be taken within 45 days after its entry. R. 4:47 governing the entry of judgments, explains that "(the) notation of a judgment in the civil judgment and order docket constitutes the entry of the judgment, and the judgment shall not take effect before such entry.

. . ." (Emphasis supplied). The language of R. 2:4-1(a) and R. 4:47 states unambiguously that the timeliness of an appeal is to be determined with reference to the date on which the judgment is docketed, not the date on which it is signed by the court.

Here, although the trial court approved the settlement agreement in open court and signed a judgment embodying that decision on November 21, 1985, the Clerk did not enter the judgment on the docket until January 2, 1986. Since Leighton filed the notice of appeal on February 3, 1986, within 45 days of the entry of judgment, the appeal was timely filed.

II.

Standing of Leighton to Object to the Trial Court's Order Approving the Settlement Agreement

Even though the appeal was filed

within the period provided by R. 2:4-1(a), there remains a substantial question as to whether Leighton had the standing to object to the trial court's approval of the settlement and to prosecute this appeal. The trial court identified as a "real issue", but did not address "the status of Mr. Leighton in this litigation . . . considering the date of acquisition of his shares." This was an ancillary issue in the November 21, 1985 hearing in which the primary focus was the reasonableness of the settlement agreement. However, on this appeal, the question of Leighton's standing to object to the order approving the settlement agreement is of paramount importance. Although Leighton gives only cursory attention to this issue in his brief, both respondents address it at length. Thus, we must examine the threshold issue of standing.

N.J.S.A. 14A:3-6(1) of the New Jersey Business Corporation Act deals with actions by shareholders and expressly provides that :

> No action shall be brought in this State by a shareholder in the right of a domestic or foreign corporation unless the plaintiff was a holder of shares. . .at the time of the transaction of which he complains, or his shares . . . devolved upon him by operation of law from a person who was a holder at such time. (Emphasis supplied).

See also R. 4:32-5 (which states that in a derivative action, "the complaint shall be verified and allege that the plaintiff was a shareholder at the time of the transaction of which he complains."(Emphasis supplied.))

Although the contemporaneous ownership rule governs the issue of standing to bring a derivative suit, it is, nonetheless, applicable in this case where the question is whether Leighton has standing to object to a settlement

agreement. As recognized by the Fifth Circuit Court of Appeals, the two issues are so closely related that the test to resolve one is equally appropriate for the resolution of the other. See Darrow v. Southdown, Inc., 574 F. 2d 1333, 1336 (5th Cir. 1978), cert.denied sub nom. D. Doyle Mize and Addis Corporation v. Stella Darrow, 439 U.S. 984. Darrow involved an appeal from a settlement agreement approved by the district couort "in partial resolution of three class action - shareholders' derivative suits." Id. at 1335. There, appellant Mize was the principal target of all three suits which alleged that, as chairman and chief executive officer of appellee corporation, he had engineered several transactions to enrich himself and his colleagues at the corporation's expense. Thus, although the settlement agreement dismissed many of the charges levied in

the three actions, it preserved the claims against Mize and his cohorts. Mize appealed from the judgments approving the settlement not in his capacity as defendant, but rather as a stockholder seeking to protect the rights of the corporation which he allegedly had injured. This blatant conflict of interests coupled with the requirement of Fed.R.Civ.Proc. 23.1 that a plaintiff in a derivative suit fairly and adequately represent the interests of similarly situated shareholders, led the Fifth Circuit Court of Appeals to conclude that "on priniciples akin to standing, Mize .... (could not) object to the settlement." Id. at 1336. (Emphasis supplied).

The emphasized language underscores the fact that that case concerned whether an individual had standing to object to an agreement which settled three

derivative suits . Darrow did not present the question of whether appellant had standing to bring the derivative actions. Nonetheless, the Darrow court measured Mize's ability to object to the settlement agreement "by asking whether he could have brought a derivative action in the first instance." Ibid. Thus, the Darrow court analyzed the standing issue under Fed. R. Civ. P. 23.1. In light of the similarity between Fed.R.Civ.P. 23.1[1/] and the provisions involved herein, we should determine Leighton's standing to object under the requirements set forth in N.J.S.A. 14A:3-6(1) and R. 4:32-5.

However, application of these provisions is not straightforward in this matter. N.J.S.A. 14A:3-6(1) and R.4:32-5 require ownership of stock prior to the transaction of which one is complaining.

Here, there was a series of events commencing with the May 6, 1985 agreements between Uniroyal and Icahn, and Uniroyal and C&D and culminating in the November 21, 1985 hearing at which time the settlement was approved. Resolution of the standing issue hinges upon identifying which of these events is the "transaction" of which Leighton is complaining. If the transaction, as defined, occurred prior to November 15 or 16, 1985, when Leighton purchased his shares of Uniroyal first preferred, Leighton lacks standing. However, if the transaction is deemed to have occurred subsequent to Leighton's acquisition of Uniroyal first preferred stock, his appeal is properly before this Court.

Because there are no reported New Jersey decisions which define the concept of "transaction", an examination of the

law of other jurisdictions will prove instructive. As the issue involved herein is one of corporate law, an appropriate source of reference is the case law of Delaware. In Jones v. Taylor, 348 A.2d 188 (Del. Ch. 1975), which considered an expectant legacy in stock was sufficient to satisfy the contemporaneous ownership, the court discussed the Delaware counterparts to N.J.S.A. 14A:3-6(1) and R.4:32-5. "8 Del. C. Sec. 327 and Chancery Rule 23.1 make it clear that in order to maintain a derivative suit it must appear by the averments of the complaint that the plaintiff was . . . a stockholder of the corporation at the time of the transaction of which he complains." Id. at 190. The purpose of these provisions is "to eliminate strike suits and other abuses which developed along with the derivative suit." Id. at 191. Thus,

Jones establishes that the requirements and underlying purposes of the Delaware provisions parallel those of New Jersey. See Valle v. North Jersey Automobile Club, 141 N.J. Super. 568, 579 (App. Div. 1976), modified and aff'd, 74 N.J. 109 (1977) (one of the rationales for R. 4:32-5 "is that it may operate to thwart the practice of acquiring a few shares of a corporation's stock in order to harass it with litigation and force a settlement favorable to the plaintiff, a practice commonly referred to as a 'strike suit.'"). Therefore, cases interpreting the Delaware provisions may also explain how the provisions involved in this case should be construed.

The question of what constitutes a transaction for purposes of the contemporaneous ownership rule was directly addressed in Levien v. Sinclair Oil Corp., 261 A. 2d 911 (Del. Ch. 1969). There plaintiff was a minority

stockholder in Venezuelan, a corporation owned almost entirely by defendant.

One of the derivative claims asserted by plaintiff was that defendant's expansion into the Colombian oil market by means of three joint ventures was an appropriation of corporate opportunities. These joint venture agreements were consummated on June 24, 1959, April 28, 1960 and November 15, 1960, respectively. However, the subsidiary through which defendant entered these agreements was formed on March 18, 1959 expressly for purposes of entering the Colombia oil market. Plaintiff became a stockholder of Venezuelan on April 19, 1960.

Plaintiff argued that because oil had not been discovered in commercial quantities in Colombia until after April, 1960, corporate opportunities did not exist and therefore could not have been appropriated until that time. Having

acquired his stock in April, 1960, plaintiff maintained that he was already a shareholder at the time of the wrongful appropriation which, according to plaintiff, was the transaction of which he was complaining. The Levien court disagreed. Finding that the appropriation occurred in 1959 when defendants founded a corporation as a vehicle for its operations in Colombia, the court stated: "That is the fundamental basis which underlies the complaint, that is the 'transaction' under attack. What followed (the three joint ventures) merely implemented the 1959 action." Id. at 922. Even though two of the joint venture agreements were signed after plaintiff had become a shareholder, the Levien court concluded that plaintiff lacked standing to

complain about any aspect of the lost corporate opportunities.

Another case which is instructive on how to define transaction in the context of the contemporaneous ownership rule is Lavine v. Gulf Coast Leaseholds, Inc., 122 A. 2d 550 (Del. Ch. 1956). Plaintiff in Lavine, a common stockholder of Gulf Coast Leaseholds, Inc, (Gulf), charged the corporate and individual director defendants with an illegal stock exchange. Alleging that the transaction at issue was completed prior to plaintiff's becoming a shareholder, defendants moved for partial summary judgment and to strike a part of the complaint.

In resolving this dispute, the Lavine court noted when certain critical events occurred. On October 29, 1954, defendants sent to Gulf's Class A stockholders the offer to make the

exchange with the stipulation that the proposed exchange would only be effective upon shareholder approval. Approval was in fact granted at a general meeting of stockholders on March 30, 1955. Sometime in the interim, but no later than December 22, 1954, plaintiff became the owner of Gulf common stock. On the basis of these facts, the court in Lavine concluded that plaintiff had become a stockholder before the transaction complained of was completed. The explicit condition of the exchange offer that it was made subject to stockholder approval postponed completion of the transaction until the March 30, 1955 meeting. By this time, plaintiff had acquired his shares and, therefore, standing to challenge any subsequent corporate action.

The analyses in Levien and Lavine

are useful tools for resolving the instant controversy. Leighton purchased his shares of Uniroyal first preferred on or about November 15, 1985. At that point, the only act which had yet to be completed was the court's approving the parties' settlement agreement. Thus, Leighton apparently contends that the November 21, 1985 order, which simply gave judicial sanction to the settlement, was the transaction of which he is complaining. A brief review of the events giving rise to this case makes clear that Leighton's argument is untenable.

The agreement in which Uniroyal committed itself to pay Icahn $5.9 million to support the merger was consummated on May 6, 1985. The merger agreement itself was entered into on this same date and received shareholder approval on September 23, 1985. It was because of these two agreements that

plaintiff filed suit on August 1, 1985 and that the settlement, embodied in the November 21, 1985 order, was reached. These facts conclusively prove that the agreements which accomplished the merger are "the fundamental basis which underlies then complaint, (they are) the 'transaction' under attack." Levien, supra, 261 A. 2d at 922. The ensuing litigation and settlement were spawned by this transaction which commenced on May 6, 1985. As in Lavine, completion of this transaction required shareholder approval. Such approval was forthcoming on September 23, 1985, long before Leighton became a holder of Uniroyal first preferred stock.

An examination of the record also supports the conclusion that the merger agreements constitute the transaction of which Leighton is complaining. At the November 21, 1985 hearing, Leighton remarked that 'the settlement of the

class claims are good and they be put through." Clearly, his opposition to the settlement was not directed at the rights or benefits it conferred upon the class of first preferred shareholders. Rather, Leighton's objections were premised on the bar of "derivative suits by any shareholder of Uniroyal" that would be affected by the settlement. Specifically, Leighton alleged that the $47.9 million spent on the merger and the $5.9 million paid to Icahn constituted waste which, by virtue of the settlement, could not be redressed through a derivative action. These points are reiterated in Leighton's brief on this appeal.

Thus, the record establishes that the primary reason for Leighton's objections was the expenditure of millions of dollars of corporate funds in support of the merger. As previously noted, the agreements which eventually led to the merger were signed on May 6,

1985. Further support for selecting this date as the "transaction date" is the reference to May 6, 1985 by the trial court in defining the class of first preferred shareholders for purposes of settlement. Apparently, the trial court believed that the agreement with Icahn and the merger agreement were central to the events of this controversy and, therefore, May 6, 1985 was an appropriate date by which to designate those first preferred stockholders with a community of interest. By similar reasoning, we conclude that May 6, 1985, or at the very latest, September 23, 1985, when the shareholders approved the merger, was the date of the transaction about which Leighton wishes to object. Since Leighton had not obtained his shares of Uniroyal first preferred by that time, he lacked standing to bring this appeal.

III.

Merits of the Appeal

Even if we were to ignore Leighton's lack of standing to object to the settlement and prosecute this appeal, we are nevertheless convinced that the judgment under review should be affirmed. Our study of the record in light of the arguments presented satisfies us that Judge Lester did not mistakenly exercise his discretion by approving the settlement agreement concerning the merger and restructuring of Uniroyal and that all of the issues of law raised with respect thereto are clearly without merit. R.2:11-3(e)(1)(E).

Accordingly, the appeal is dismissed with prejudice.

- - - - - - - - - - - - - - -

1/ Fed.R.Civ.P. 23.1 provides in part:

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be vertified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains . . .

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Docket No. A-2522-85T6

ORDER ON MOTION

Motion filed : February 9, 1987

Submitted to Court : March 9, 1987

This matter having been duly presented to the Court, it is on this 9th day of March, 1987 hereby ordered as follows :

Motion by Appellant William Leighton for reconsideration -- Denied.

For the Court :

/s/ Herman D. Michels, P.J.A.D.

Filed : March 12, 1987, Appellate Division

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Docket No. A-2522-85T6

ORDER ON MOTION

Motion filed : June 4, 1987

Submitted to Court : June 10, 1987

This matter having been duly presented to the Court, it is on this 12th day of June, 1987, hereby ordered as follows :

Motion by Respondent Bernard Pogostin for Deposit of Costs : granted.

Supplemental: The costs taxed by the Clerk of the Appellate Division in favor of plaintiff Bernard Pogostin shall be paid by appellant William Leighton.

For the Court :

/s/ Herman D. Michels, P.J.A.D.

Filed : June 15, 1987, Appellate Division

SUPREME COURT OF NEW JERSEY

C-1290 September Term, 1986

26,965

Bernard Pogostin,

Plaintiff-Respondent,

vs.

UNIROYAL Inc., et al.,

Defendants-Respondents.

vs.

WILLIAM LEIGHTON,

Objector-Petitioner.

To the Appellate Division, Superior Court :

A petition for certification of the judgment in A-2522-85T6 having been submitted to this Court, and the Court having considered the same;

IT IS ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 7th day of July, 1987.

/s/ Stephen W. Townsend, Clerk.

Filed, Supreme Court, July 9, 1987

SUPREME COURT OF NEW JERSEY

M-1122 September Term, 1986

26,965

Bernard Pogostin,

Plaintiff-Respondent,

vs.

UNIROYAL Inc., et al.,

Defendants-Respondents.

vs.

WILLIAM LEIGHTON,

Petitioner-Objector-Movant.

This matter having been duly presented to the Court, it is ORDERED that the motion to disqualify respondent's counsel is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 7th day of July, 1987./s/ Stephen W. Townsend, Clerk

Filed: July 9, 1987, Supreme Court.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Docket No. A-2522-85T6

ORDER ON MOTION

This matter having been duly presented to the Court, it is on this 8th day of September, 1987 hereby ordered as follows :

Motion by Appellant William Leighton for reconsideration of M-4632-86 - denied.

For the Court :

/s/ Herman D. Michels, P.J.A.D.

Filed : September 10, 1987

Appellate Division

MEMORANDUM OF UNDERSTANDING

The parties to the action entitled Bernard Pogostin v. Uniroyal, Inc., Docket No. C-4115-85E, now pending in the Superior Court of New Jersey, Chancery Division, Bergen County ("the Action") and CDU Holding, Inc. ("Holding"), by their respective attorneys, have reached an agreement in principle providing for the settlement of the Action on the terms and subject to the conditions set forth below.

1. If the proposed merger between UNIROYAL, Inc. ("Uniroyal") and a wholly-owned subsidiary of Holdidng ("the merger") is consummated and upon final approval of the settlement contemplated hereunder by the Superior Court of New Jersey, Chancery Division, Bergen County ("the Court"), Uniroyal Common and First Preferred shareholders will be asked to approve amendments to

the Certificate of Organization of Uniroyal (voting together as a single class) to provide that : (a) holders of Uniroyal First Preferred Stock shall be entitled to receive out of net earnings of Uniroyal legally payable as dividends, cumulative cash dividends at the annual rate of $8.00 per share, and no more, in equal semi-annual or quarterly payments on dates to be determined by the Board of Directors; and (b) on each September 25, commencing on September 25, 1995, Uniroyal shall call for redemption by lot 101,857 shares of Uniroyal First Preferred Stock (or, if fewer than 101,857 shares of First Preferred Stock are then outstanding, the number of shares then outstanding), by paying therefor $100 per share in cash plus accrued and unpaid dividends to the date of payment. Holding shall vote its shares of Uniroyal Common Stock in favor of the proposed amendments.

2. Plaintiff's counsel intends to apply to the Court for an award of attorneys' fees and disbursements in an amount not to exceed $600,000. Uniroyal will not oppose such an application. Subject to the terms and conditions of this Memorandum of Understanding and the Stipulation of Settlement contemplated by paragraphs 5 and 8 below, Uniroyal will pay plaintiff's counsel such amounts within such limit as may be awarded by the Court. Uniroyal shall pay the costs and expenses related to providing Notice of the settlement to Uniroyal First Preferred shareholders.

3. Plaintiff shall promptly file an amended complaint in the Action reflecting the additional claims that plaintiff's counsel has indicated he has intended to assert, which amended complaint shall allege, in addition to

the existing claims in the complaint, on his own behalf as well as on behalf of all Uniroyal First Preferred shareholders, and derivatively on behalf of Uniroyal : (a) that the merger, the financing agreements to be entered into by Uniroyal in connection with the merger, and the restructuring (including the possible grant of security interests) that Uniroyal's Board will be authorized to effect following the restructuring ("the restructuring") violate and threaten to violate Article VIII of Uniroyal's By-Laws; (b) that the Uniroyal Board of Directors and Uniroyal management have breached and are threatening to breach their fiduciary duty to Uniroyal First Preferred shareholders in connection with actions already and contemplated to be taken with respect to the merger and the restructuring; (c) that Uniroyal First Preferred shareholders are entitled to a

class vote with respect to the merger and the restructuring; and (d) that the merger and the restructuring are unfair to Uniroyal First Preferred shareholders. Plaintiff shall not seek preliminary or permanent injunctive relief against the consummation of the merger or the restructuring.

4. Plaintiff's counsel shall retain an investment banking firm to render an opinion (prior to any hearing before the Court to approve this settlement) as to the fairness of this settlement to the holders of Uniroyal First Preferred Stock from a financial point of view. Uniroyal shall pay a fee to the investment banking firm with respect to its rendering of its opinion up to the amount of $150,000 (including disbursements). Uniroyal shall cooperate with the investment banking firm on a reasonable basis in connection with its

rendering of its opinion.

5. The parties to the Action will attempt in good faith to agree upon and execute an appropriate Stipulation of Settlement and such other documentation as may be required in order to obtain Court approval of the settlement upon the terms set forth in this Memorandum of Understanding. The Stipulation of Settlement will expressly provide, inter alia:

(a) that the defendant has denied, and continues to deny, that it has committed or has threatened to commit any violations of law and that it is entering into the Stipulation because the proposed settlement would eliminate the burden and expense of further litigation and would facilitate the consummation of the merger and the restructuring, which

transactions are in the best interests of Uniroyal and all of its shareholders;

(b) that the parties shall apply to the Court for an Order certifying this Action as a class action, for purposes of settlement only, under Rules 4:32-1(b)(1) and (2) of the New Jersey Rules Governing Civil Procedure;

(c) that a release shall be granted from plaintiff and the class, which release shall provide, inter alia, that plaintiff and all members of the class release Uniroyal and its subsidiaries, affiliates, officers, directors, attorneys, agents, investment bankers, shareholders, employees, sucessors and assigns, and Clayton & Dubilier, Inc., Clayton & Dubilier Private Equity Fund Limited Partnership, Holding and CDU Acquisition, Inc. and their subsidiaries, affiliates, officers, directors, attorneys, agents, investment bankers, shareholders, partners,

employees, successors and assigns, from any and all claims and liability arising out of or relating to (i) the merger and the restructuring, (ii) the allegations contained in the complaint in the Action as amended, and (iii) the disclosure made with respect to the merger and restructuring.

6. The parties to the Action will present the settlement to the Court for approval as soon as practicable following appropriate Notice to the holders of Uniroyal First Preferred Stock on whose behalf the Action was instituted, and will use their best efforts to obtain final Court approval of the settlement and the dismissal of the Action with prejudice as against the named plaintiff and Uniroyal First Preferred shareholders and without costs to any party (except as provided for in paragraphs 2 and 4 above).

7. The parties shall make an application to the Court as soon as practicable for an Order in the form annexed hereto as Exhibit 1: (a) certifying the Action, for settlement purposes only, as a class action under Rules 4:32-1(b)(1) and (2) of the New Jersey Rules Governing Civil Practice, such certification to be conditioned upon the Court's final approval of this settlement; and (b) enjoining any holder of Uniroyal First Preferred Stock from commencing an action challenging the legality of the merger, the restructuring and/or any other transaction described in the Uniroyal Proxy Statement dated August 28, 1985 in any respect in any court other than the Court.

8. The consummation of the settlement is subject to the completion by plaintiff of any additional necessary

discovery satisfactory to plaintiff, the drafting and execution of an appropriate Stipulation of Settlement and such other documentation as may be required to obtain final court approval of the settlement, and the dismissal of the Action with prejudice and without costs to any party (except as provided for in paragraphs 2 and 4 above).

9. The settlement contemplated by this Memorandum of Understanding will not be binding upon any party until the discovery referred to in paragraph 8 above has been completed, an appropriate Stipulation of Settlement has been signed and final court approval of the settlement and the dismissal of the actions with prejudice and without costs (except as provided for in paragraphs 2 and 4 above) has been obtained. This Memorandum of Understanding shall be null and void and of no force and effect

should any of these conditions not be met or should plaintiff's counsel determine that, based uupon discovery or subsequent events, the settlement is not fair and reasonable and, in that event, this Memorandum of Understanding shall not be deemed to prejudice in any way the positions of the parties with respect to the Action.

Dated : New York, New York
September 9, 1985

SILVERMAN & HARNES
by /s/ Sidney Silverman
Attorneys for Plaintiff Bernard Pogostin

WACHTELL LIPTON ROSEN & KATZ
By /s/ Marc Wolinsky
Attorneys for Defendant UNIROYAL, Inc.

DEBEVOISE & PLIMPTON
by/s/ Meredith M. Brown
Attorneys for CDU Holding, Inc.

RELEASE

KNOW ALL MEN, that UNIROYAL, Inc. for good and valuable consideration, the receipt of which is hereby acknowledged, has remised, released and forever discharged, and by these presents does for itself, its successors and assigns remise, release, and forever discharge its subsidiaries, affiliates, officers, directors, attorneys, agents, investment bankers, shareholders, employees, successors and assigns, Ross Barzelay, David Beretta, Norborne Berkeley, Jr., E. Paul Casey, Frederick Colombo, E. Raymond Corey, Joseph P. Flannery, Allen J. Krowe, Horace G. McDonell, Jr., Burnell R. Roberts, Howard B. Wentz, Jr., W. Thomas York, and Clayton & Dubillier, Inc.The Clayton & Dubilier Private Equity Fund Limited Partnership, CDU Holding, Inc. and CD Acquisition, Inc. and their subsidiaries, affilliates, officers, directors, attorneys, agents, investment bankers, shareholders, partners,

employees, successors and assigns (the "Releasees"), of and from any and all of the claims in the action entitled Pogostin vs. UNIROYAL, Inc. et al.Docket No. C.4115-85E (Superior Court of New Jersey, Chancery Division: Bergen County) ("the Action") and any and all possible claims and liability that are or could have been asserted in the Action in connection with, that arise now or hereafter out of, or in any way relate to the Action or any of the matters, transactions or occurrences referred to in the Action, including, without limitation, all claims of any type relating to the merger (the "Merger") by and among CDU Holding, Inc., CDU Acquisition, Inc. and Uniroyal, the restructuring of Uniroyal ("the Restructuring") and the disclosure made with respect to the Merger and Restructuring.

This Release may not be changed orally.

IN WITNESS WHEREOF, Alan R. Elton, Vice President and General Counsel of Uniroyal has hereunto set his hand and seal the day of 1985.

_____

Alan R. Elton
Vice President and
General Counsel,
Uniroyal, Inc.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 28, 1987

Present - Hon. Theodore R. Kupferman,
Justice Presiding
John Carro
Sidney H. Asch
Betty Weinberg Ellerin
Richard W. Wallach,
Justices

- - - - - - - - - - - - - - - - - - -x

In the Matter of Ilan Reich
(admitted as Ilan K. Reich),
an attorney and counselor-at-law

Departmental Disciplinary Committee
for the First Judicial Department,
Petitioner

Ilan Reich (admitted as Ilan K. Reich),
Respondent.

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No. M-742, Filed May 28, 1987

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The Departmental Disciplinary Committee for the First Judicial Department, by Michael A. Gentile, its attorney, having presented a petition to this Court alleging that respondent, Ilan Reich, who has admitted as Ilan K. Reich to practice as an attorney and counselor-at-law in the State of New York at a Term of the Appellate Division of the Supreme Court for the First Judicial Department on March 17, 1980, was convicted on January 23, 1987, in the United States District Court for the Southern District of New York, upon his plea of guilty, to two counts of an indictment charging him with securities fraud, i.e., insider trading and mail fraud, in violation of 15 U.S.C. Sections 78j(b) and 78ff, 17 C.F.R. 240.10b-5, 18 U.S.C. Section 2 and 18 U.S.C. Sections 1341 and 2, and seeking an order striking

respondent's name from the roll of attorneys and counselors-at-law in the State of New York pursuant to Judiciary Law Section 90, subdivision 4(b), upon the ground that respondent has been disbarred based upon a conviction of a felony as defined by Judiciary Law Section 90, subdivision 4(e); and respondent having appeared herein by Obermaier, Morvillo & Abramowitz, P.C., his attorneys, and having interposed an answer to said petition, seeking an order denying the petition, and referring the instant proceeding to a referee, justice or judge appointed by this Court for hearing, report and recommendation as to an appropriate term of suspension,

Now, upon reading and filing the notice of presentation of the petition dated February 17, 1987, with proof of due service thereof, the petition of the Departmental Disciplinary Committee for the First Judicial Department verified on February 17, 1987, the exhibits

annexed thereto, in support of the petition, the reply memorandum on behalf of petitioner, dated April 23, 1987, and the exhibit annexed thereto, all in support of the petition, and the affidavit of Robert G. Morvillo, sworn to on April 7, 1987, the exhibit annexed thereto, the answer of respondent verified on April 7, 1987, and respondent's brief in response to petitioner's reply memorandum, dated May 12, 1987, all in opposition to the petition, and after hearing Michael A. Gentile for the petition and Robert G. Morvillo, opposed; and due deliberation having been had thereon, and upon the Opinion Per Curiam filed herein, and respondent having been disbarred based upon a conviction of a felony as defined byJudiciary Law Section 90(4)(c), it is hereby unanimously,

ORDERED, that the petition be and the same hereby is granted, and it is

futher unanimously

ORDERED that the name of said respondent be stricken from the roll of attorneys and counselors-at-law in the State of New York, effective the date hereof; and it is further unanimously

ORDERED that said respondent be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, effective the date hereof; and it is further unanimously

ORDERED that said respondent be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, effective the date hereof; and it is further unanimously

ORDERED that said respondent be and he hereby is forbidden to give to another an opinion as to the law or its

application or any advice in relation thereto, effective the date hereof; and it is further unanimously

ORDERED that said respondent be and he hereby is directed to fully comply with the provisions of Title 22, Section 603.13, of the Rules of this Court, a copy of which is annexed hereto and made a part herof.

ENTER :

/s/ Harold J. Reynolds

Clerk

No. 87-556

Supreme Court, U.S.
FILED
NOV 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM LEIGHTON,

Petitioner,

– against –

BERNARD POGOSTIN,

Respondent,

– against –

UNIROYAL, INC., ROSS BARZELAY, DAVID BERETTA, NORBORNE BERKELEY, JR., E. PAUL CASEY, FREDERICK COLOMBO, E. RAYMOND COREY, JOSEPH P. FLANNERY, ALLEN J. KROWE, HORACE G. McDONNEL, JR., BURNELL R. ROBERTS, HOWARD B. WNETZ, JR., and W. THOMAS YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF OF RESPONDENT BERNARD POGOSTIN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

SIDNEY B. SILVERMAN
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SILVERMAN & HARNES
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Attorneys for Respondent Bernard Pogostin

November 3, 1987

QUESTIONS PRESENTED

1. Was CDU, a company whose sole assets consisted of the securities issued by its majority owned subsidiary, Uniroyal, an investment company under the Investment Company Act of 1940, where Uniroyal was a tire manufacturer and not an investment company?

2. Was the Equal Protection Clause violated by the determination by the New Jersey state court that a purported objector to a class action and stockholder derivative suit lacked standing to object, and by the rejection by that court of the objector's claim that the plaintiff in the lawsuit was not a proper plaintiff?

PARTIES TO THE PROCEEDINGS BELOW

All of the parties to the proceedings below are listed in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PARTIES TO THE PROCEEDINGS BELOW	ii
STATUTES AND RULES	viii
STATEMENT OF THE CASE	2
A. Background of the Action	5
B. The Settlement Agreement	7
C. Petitioner's Objections To The Settlement	8
SUMMARY OF ARGUMENT	15
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	16
I	
THE NEW JERSEY APPELLATE DIVISION CONSIDERED AND PROPERLY REJECTED PETITIONER'S CLAIMS UNDER THE INVESTMENT COMPANY ACT OF 1940	16

Page

II

THE NEW JERSEY APPELLATE DIVISION'S DETERMINATION THAT THE PETITIONER LACKED STANDING AND ITS REJECTION OF PETITIONER'S CLAIM THAT THE PLAINTIFF LACKED STANDING, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE 20

III

THE REMAINING ARGUMENTS IN THE PETITION ARE WITHOUT MERIT 24

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

Andre v. Merill Lynch Realty Assets, 97 F.R.D. 699 (S.D.N.Y. 1983) 29,30

Beatrice Companies, Inc., Del. Supra., 155, 156, 1986 Christie, C.J., Horsey and Moore, J.J. (Feb. 20, 1987). 14

Beef Industry Antitrust Litigation, F.2d 195 (5th Cir. 1981). 22

Jezarian v. Csapo, 483 F.Supp. 385 (S.D.N.Y. 1979). 28

Leighton v. One William Street Fund, Inc., 343 F.2d 865 (2d Cir. 1965). 13

Leighton v. One William Street Fund, Inc., [67-69] CCH Fed. Sec. L. Rep., par. 92, 195 (S.D.N.Y. 1968) aff'd 404 F.2d 351 (2d Cir. 1968) Cert. denied 89 S. Ct. 1467 (1969). 13

Leighton v. Paramount Pictures Corporation, 340 F.2d 859, 861 (2d Cir. 1965). 13

	Page
Leighton v. Sec., 221 F.2d 91 (D.C. Cir. 1955).	12
Mid Atlantic Toyota Antitrust Litigation, 564 F.Supp. 1379 (D. Md. 1983).	22
Orzech v. Englehart, 195 A.2d 375 (Del. Ch. 1963).	20
Progress Development Corp. v. Mitchell, 286 F.2d 222, 232 (7th Cir. 1961).	20
United Asset Management Corp., [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 77,088, at 77,744 (SEC NO-ACTION LETTER Nov. 27, 1981).	20
STATUTES & RULES	
Investment Company Act of 1940.	15
Investment Company Act Sec. 42(e)	26
Investment Company Act Sec. 49	26
New Jersey Statute, N.J.S.A. 14A: 3-6(3)	23
New Jersey Rules:	
R. 1:20-1(b), 1:28-2.	xiii
R. 1:21-1.	xiiii
R. 1:21-(a)	xiii
R. 1:21-2	xii
R. 2:11-3(e) (1) (E).	17

	Page
U.S. Const. art. VI § 2.	16
15 U.S.C. § 80a-41(e)	26
15 U.S.C. § 80a-48	26
15 U.S.C. § 80a-7(a) (5)	16
15 U.S.C. § 80a-3a-3	18
15 U.S.C. § 80a-3b-1	20
F.R. Civ. Proc. Rule 11.	29

STATUTES AND RULES

Investment Company Act of 1940, as amended 15 U.S.C. Sec. 80(a):

Sec. 3(a). When used in this title, "investment company" means any issuer which:

(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis. As used in this section, "investment securities" includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by

majority-owned subsidiaries of the owner which are not investment companies.

* * * *

Sec. 42(e). Whenever it shall appear to the Commission that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this title, or of any rule, regulation, or order hereunder, it may in its discretion bring an action in the proper district court of the United States, or the proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order hereunder. Upon a showing that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction or de-

cree or restraining order shall be granted without bond. In any proceeding under this subsection to enforce compliance with section 7, the court as a court of equity may, to the extent it deems necessary or appropriate, take exclusive jurisdiction and possession of the investment company or companies involved and the books, records, and assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, who with the approval of the court shall have power to dispose of any or all of such assets, subject to such terms and conditions as the court may prescribe. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this title, or of any rule, regulation, or order thereunder, to the Attorney General who, in his discretion,

may institute the appropriate criminal proceedings under this title.

* * * *

Sec. 49. Any person who willfully violates any provision of this title or of any rule, regulation, or order hereunder, or any person who willfully in any registration statement, application, report, account, record, or other document filed or transmitted pursuant to this title or the keeping of which is required pursuant to section 31(a) makes any untrue statement of a material fact or omits to state any material fact necessary in order to prevent the statements made therein from being materially misleading in the light of the circumstances under which they were made, shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both; but no person shall

be convicted under this section for the violation of any rule, regulation, or order if he proves that he had no actual knowledge of such rule, regulation, or order.

* * * *

New Jersey Rules of General Application

1:21-2. Appearances Pro Hac Vice (a) Conditions for Appearance. An attorney of any other jurisdiction, of good standing there, whether practicing law in such other jurisdiction as an individual or a member or employee of a partnership or an employee of a professional corporation authorized to practice law in such other jurisdiction, or an attorney admitted in this state, of good standing, who does not maintain in this state a bona fide office for the practice of law may, at the discretion of the court in which any matter is

pending, be permitted, pro hac vice, to speak in such matter in the same manner as an attorney of this state who is domiciled in and maintains a bona fide office for the practice of law in this state or maintains in this state his principal office for the practice of law and who is therefore, pursuant to R. 1:21-(a), authorized to practice in this state. No attorney shall be admitted under this rule without complying with R. 1:20-1(b) and R. 1:28-2. An application for admission pro hac vice shall be made on motion to all parties in the matter and shall be supported by an affidavit or certification of the attorney stating that:

(1) he is a member in good standing of the bar of the highest court of the state in which he is domiciled or

has his principal office for the practice of law;

(2) he is associated in the matter with New Jersey counsel of record qualified to practice pursuant to R. 1:21-1;

(3) the client has requested that he be represented by said attorney; and

(4) there is good cause for such admission, which may include:

(i) the cause in which he seeks admission involves a complex field of law in which he is a specialist, or

(ii) there has been an attorney-client relationship with the client for an extended period of time, or

(iii) there is a lack of local counsel with adequate expertise in the field involved, or

(iv) the cause presents questions of law involving the law of the foreign jurisdiction in which the applicant is licensed, or

(v) there is need for extensive discovery or other proceedings in the foreign jurisdiction in which the applicant is licensed, or

(vi) such other reason as would present good cause for the pro hac vice admission.

No. 87-556

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM LEIGHTON,

Petitioner,

-against-

BERNARD POGOSTIN,

Respondent,

-against-

UNIROYAL, INC., ROSS BARZELAY, DAVID BERETTA, NORBORNE BERKELEY, JR., E. PAUL CASEY, FREDERICK COLOMBO, E. RAYMOND COREY, JOSEPH P. FLANNERY, ALLEN J. KROWE, HORACE G. McDONNEL, JR., BURNELL R. ROBERTS, HOWARD B. WENTZ, JR., and W. THOMAS YORK,

Respondents.

-------*------

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

-------*------

BRIEF OF RESPONDENT BERNARD POGOSTIN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

In September, 1985, the Respondents herein entered into a memorandum of understanding[1] settling common law class and stockholder derivative claims in an action between Respondent Bernard Pogostin, as plaintiff, and the remaining Respondents, as defendants, pending in the New Jersey Superior Court. The claims were brought derivatively on behalf of Uniroyal, Inc. ("Uniroyal") and on behalf of a class consisting of all owners of Uniroyal's preferred stock. The settlement memorandum received wide publicity in the press. The New Jersey Superior Court directed that notice of the proposed settlement be given to the

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1. 59a-69a. References consisting of a number followed by the letter "a" are to the appendix annexed as part of the Petition.

class by mail and that a short form notice be published in the press, and directed that a hearing on the settlement be held on November 21, 1985.[2]

Petitioner read about the proposed settlement and purchased five shares of the preferred, on or about November 15, 1985[3], at a cost of about $250, for the express purpose of opposing the proposed settlement. Petitioner, however, did not oppose the settlement in order to benefit the class, which he had attempted to join only six days before the settlement hearing. Rather, his purpose in opposing the settlement was to benefit only himself. In a letter to Respondents' attorneys, Petitioner offered to withdraw his opposition to the settlement in

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2. 26a-30a.

3. 30a.

exchange for the payment to him of $25,000.[4] Respondents rejected this extortionate demand. Petitioner then prosecuted an appeal from the Judgment[5] of the Superior Court approving the settlement, and after the dismissal of that appeal[6], petitioned the New Jersey Supreme Court for Certification. The petition was denied.[7] In addition, Petitioner made numerous motions in the New Jersey Appellate Division and Supreme Court, and took advantage of his pro se status, all for the purpose of postponing the finalization of the settlement. This Petition is Petitioner's last attempt to delay the settlement.

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4. 1r-6r. References consisting of a number followed by the letter "r" are to the appendix annexed hereto.

5. 10a-18a.

6. 19a-53a.

7. 56a.

A. Background of the Action

In April, 1985, Carl Icahn ("Icahn") announced a cash tender offer at $18 per share, for a sufficient amount of Uniroyal, Inc. ("Uniroyal") common stock to raise his holdings to 53% of Uniroyal's outstanding common. Icahn proposed to obtain the remaining 47% by merger. The directors of Uniroyal opposed the tender offer on several grounds, and a proxy contest and litigation ensued. A "standstill" arrangement was entered into, following which it was agreed that Uniroyal would acquire all outstanding shares of its common stock at $22 per share, and Uniroyal would thereafter be entirely owned by CDU Holding, Inc. ("CDU"). The $22 price was established in negotiations with Icahn, who owned more than 3,165,600 shares of Uniroyal common

stock. Icahn was to receive the same $22 for his shares as the public received for theirs.

Although the purchase plan made provision for the common stockholders, none was made for Uniroyal's preferred stock. Respondent Pogostin, an owner of preferred stock, commenced an action on behalf of all Uniroyal preferred shareholders. He contended that the plan was, in economic effect, a liquidation, and that the preferred stock should be redeemed at $100 per share, or alternatively, receive its liquidation preference of $100. The defendants contended that the reorganization was, in fact, a merger, and that Uniroyal was not required to redeem or pay a liquidation preference to the preferred stock.

B. The Settlement Agreement

After discovery had been completed, expert witness reports and pretrial briefs prepared, and a firm trial date obtained, the parties entered into a settlement agreement.

The settlement effected a change in the preferred dividend from non-cumulative to cumulative, and provided for its mandatory redemption at $100 per share commencing in 1995. The terms of the settlement were thereafter accelerated by the actual liquidation of Uniroyal, and in 1986, the preferred stockholders received $100 per share plus an $8 dividend, representing the full recovery sought in the litigation. Thus, the settlement and subsequent events have secured for Uniroyal preferred stockholders, the maximum recov-

ery which they could possibly achieve under law.

C. Petitioner's Objections To The Settlement

Petitioner, as noted, purchased Uniroyal stock to oppose the settlement. At a hearing held on November 21, 1985, to determine whether the settlement should be approved, Petitioner stated that the class settlement was "good" and "should be put through". However, Petitioner asserted that Icahn had received "greenmail" from Uniroyal, and that the release issued in connection with the settlement should not release Icahn from any claim in connection with the alleged "greenmail" payment.

In making the aforesaid contention, Petitioner ignored the fact that the release issued in connection with the settlement does not release

Icahn from any claim. It releases only the defendants and entities related to CDU. (70a-72a) Also, Icahn received exactly the same $22 per share price for his stock which was paid to the public shareholders. Since the price paid to Icahn for his stock could not give rise to a "greenmail" claim, Petitioner argued that Uniroyal's reimbursement of $5,900,000 of Icahn's expenses incurred in connection with his attempt to acquire Uniroyal was a "greenmail" payment.

However, the record reflects that Icahn's expenses actually exceeded $10 million. Icahn, in pursuing Uniroyal, had retained an investment banking firm, engaged in litigation and obtained a line of credit from a bank. Uniroyal took the same steps in opposing Icahn, at a cost of about $22 million.

Icahn's expenses of $10 million are modest in light of Uniroyal's expenses.

Thus, the $5.9 million payment failed to cover Icahn's expenses, and left him with a $4.1 million deficit. Far from receiving a "greenmail" payment, Icahn received only partial reimbursement of his expenses and exactly the same price per share as did all the other Uniroyal stockholders.

Based upon the submissions made at the hearing and the trial judge's intimate knowledge of the action, he approved the settlement.(10a-18a) Thereafter, Petitioner filed an appeal. An inquiry was made to Petitioner to determine his reason for the filing of said appeal. In a letter to all parties, dated February 16, 1986, Petitioner showed his hand. He stated that he was willing to abandon his

appeal upon payment of $25,000 to him by "certified or cashier's check". He enclosed a stipulation dismissing his appeal and directing the payment to him of $25,000, which he urged the attorneys for the parties to sign.[8]

In the aforesaid letter, Petitioner sought to justify his request for a fee. He argued that as a result of his delaying tactics, payment by Uniroyal of the fees awarded by the trial court had been held up, without interest, and Uniroyal had had the use of such funds during the period of delay:

> "Uniroyal may benefit from the appeal because there is no judgment requiring it to pay $150,000 to plaintiff's expert, M.J. Whitman & Co., Inc. The judgment is for $600,000 only, representing at $200 per

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8. 1r - 6r.

> hour, 3,000 hours of work. Uniroyal has already benefited to the extent of some $10,000 representing interest at 7% on the $600,000 which it has not yet paid in satisfaction of the judgment.
>
> Should you agree to the terms of the proposed stipulation or should you have alternative proposals, please sign and return to me this document for submission to the appellate court for action under R. 2:8-2. As I read the rule, no order of the appellate court is necessary for the approval of the stipulation."

This is not the first time that Petitioner has engaged in nuisance suits. Since the 1950's, he has been the subject of judicial opinions sharply criticizing his abusive and frivolous litigation.[9] Nor is this the first time

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9. See, Leighton v. SEC, 221 F.2d 91 (D.C. Cir. 1955); Leighton v. One William Street Fund, Inc., 343 F.2d 865

that Petitioner has abused the legal system. As the United States Court of Appeals for the Second Circuit observed in upholding an order holding Petitioner in contempt:

> "Here Leighton was an habitual pro se litigant whose claims were often conclusory and lacking in legal merit."[10]

In addition, this is not the only instance in which Petitioner has purchased stock solely for purposes of suit. Indeed, very recently, the Supreme Court of Delaware rejected Petitioner's appeal from a settlement involving the Beatrice Company, Inc. on

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(2d Cir. 1965); Leighton v. One William Street Fund, Inc., [67-69] CCH Fed. Sec. L. Rep., par. 92,195 (S.D.N.Y. 1968) aff'd 404 F.2d 351 (2d Cir. 1968) cert. denied 89 S.Ct. 1467 (1969).

10. Leighton v. Paramount Pictures Corporation, 340 F.2d 859, 861 (2d Cir. 1965).

the ground that he lacked standing, since he had purchased stock for the purpose of opposing the settlement.[11]

In this case, the Appellate Division of the Superior Court of New Jersey dismissed Petitioner's appeal on the merits. 523 A.2d 1078 (1987). (19a-53a). That Court held that Petitioner lacked standing to object to the settlement or prosecute an appeal from the approval of the settlement, and that in any case, the Petitioner's arguments were without merit. Petitioner's motion for reconsideration by the Appellate Division was denied on March 12, 1987. (54a) His petition to the Supreme Court of New Jersey for certification was denied by order filed July 9, 1987. (56a)

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11. In Re Beatrice Companies, Inc., Del. Supr., 522 A.2d 865 (1987).

SUMMARY OF ARGUMENT

The petition raises no issue warranting review by the Court. The Petitioner's claim that CDU is an investment company under the Investment Company Act of 1940 was properly rejected by the Appellate Division of the Superior Court of New Jersey as were the Petitioner's other objections to the settlement. Further, the Appellate Division's determination that Petitioner lacked standing, but that respondent Pogostin was a proper plaintiff, does not implicate the Equal Protection Clause.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

THE NEW JERSEY APPELLATE DIVISION CONSIDERED AND PROPERLY REJECTED PETITIONER'S CLAIMS UNDER THE INVESTMENT COMPANY ACT OF 1940

The Petitioner states, as one of his grounds for the grant of the writ, that the New Jersey courts disregarded their duties under Article VI, Section 2 of the Constitution of the United States to test under the Investment Company Act of 1940 (the "ICA"), the acquisition by CDU of Uniroyal. The Petitioner argued below that, as a result of such acquisition, CDU became an investment company prohibited by Section 7 (a)(5) of the Act, 15 U.S.C. § 80a-7(a)(5) from controlling Uniroyal.

Petitioner's claim that the New Jersey courts failed to consider

this argument is without basis. The Appellate Division, after holding that Petitioner lacked standing to object to the settlement, stated as follows:

> "Even if we were to ignore Leighton's lack of standing to object to the settlement and prosecute this appeal, we are nevertheless convinced that the judgment under review should be affirmed. Our study of the record in light of the arguments presented satisfies us that Judge Lester did not mistakenly exercise his discretion by approving the settlement agreement concerning the merger and restructuring of Uniroyal and that all of the issues of law raised with respect thereto are clearly without merit. R.2:11-3(e)(1)(E)." (52a)

Thus, the Appellate Division clearly considered all the Petitioner's argu-

ments. It was not required to address each of them independently.

The Appellate Division's summary dismissal of the Petitioner's argument that the ICA was violated was fully justified. That argument is so clearly lacking in merit as to demonstrate, in and of itself, the Petitioner's bad faith and dilatory motive. Section 3(a)(3) of the ICA, 15 U.S.C. § 80a-3a-3, in relevant part, defines an investment company as any issuer which:

> "(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities have a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated

> basis. As used in this section "investment securities" includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which are not investment companies." (emphasis supplied)

Here, it is beyond dispute that CDU is not an investment company as claimed by Petitioner, because it does not own any "investment securities." CDU's only asset is the common stock of its wholly-owned subsidiary, Uniroyal. Because Uniroyal is a manufacturing and marketing business, not an investment company, Uniroyal stock is patently not an "investment security" within the

meaning of Section 3(a) (3).[12] Accordingly, Petitioner's argument is a totally frivolous one.

II

THE NEW JERSEY APPELLATE DIVISION'S DETERMINATION THAT THE PETITIONER LACKED STANDING AND ITS REJECTION OF PETITIONER'S CLAIM THAT THE PLAINTIFF LACKED STANDING, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

The Appellate Division, in a lengthy and well-reasoned decision, held that the Petitioner, who purchased his stock after the settlement to which he objected, lacked standing to object

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12. Moreover, CDU is entitled to the exemption provided by Section 3 (b) (1) of the ICA, 15 U.S.C. Sec.80a-3b-1 which excludes from the coverage of the Act companies that are engaged, directly or indirectly, in businesses other than investing and trading in securities. See Orzech v. Englehart, 195 A.2d 375 (Del. Ch. 1963). See United Asset Management Corp., [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) par. 77,088, at 77,744 (SEC No-Action Letter Nov. 27, 1981); Progress Development Corp. v. Mitchell, 286 F.2d 222, 232 (7th Cir. 1961).

thereto or prosecute an appeal from the Superior Court's approval thereof. The Appellate Division also rejected Petitioner's argument that Respondent Pogostin lacked standing to bring this suit. Petitioner now argues that the Appellate Division violated the Equal Protection Clause by ruling that he lacked standing, but failing to determine that Respondent Pogostin had it. This argument is frivolous. As noted earlier, the Appellate Division decided in its opinion that all the "issues of law raised with respect" to the settlement were without merit. (52a) Thus, there was no "discrimination".

Moreover, Petitioner's attack on Respondent Pogostin's standing clearly lacked a valid basis. Respondent Pogostin submitted sworn tes-

timony that he acquired his Uniroyal preferred in November, 1978, more than six years prior to the events in issue. Respondent Pogostin was certified as class representative for settlement purposes only, and there is nothing improper about the procedure used below in the context of a settlement.[13] Certain factors which a court must generally consider in determining whether a plaintiff should be certified as class representative for litigation purposes, are irrelevant in the context of a settlement. For example, the plaintiff's ability to finance the litigation is not relevant, where the litigation is being settled. Further, the trial judge held a hearing on the settlement at which

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13. See e.g., In re Beef Industry Antitrust Litigation, F.2d 195 (5th Cir. 1981); In re Mid Atlantic Toyota Antitrust Litigation, 564 F. Supp. 1379 (D.Md. 1983).

Petitioner and others had the opportunity to raise any matters deemed relevant to Respondent Pogostin's certification for settlement purposes. No objection to such certification was made below.

Further, Petitioner argues that under New Jersey law, Respondent Pogostin would lack standing to sue derivatively unless his Uniroyal preferred had a market value of over $25,000 or he posted security. Petitioner has misstated New Jersey law. N.J.S.A. 14A:3-6(3) provides that in a derivative suit, if the plaintiff's shares are worth less than $25,000, the corporation on whose behalf the derivative suit is brought "shall be entitled . . . to require the plaintiff . . . to give security for the reasonable expenses, including fees of attorneys,

that may be incurred by it . . . . " There is no requirement that security be demanded or posted at the time suit is brought.

III

THE REMAINING ARGUMENTS IN THE PETITION ARE WITHOUT MERIT

In addition to the arguments discussed above, the Petition contains a potpourri of misstatments of law and fact. At page 23 of the Petition, the Petitioner speculates that Respondent Pogostin had advance knowledge of the plan for CDU to acquire Uniroyal at $22 per share, because the complaint was filed August 1, 1985, but the proxy statement describing the plan and giving formal notice of the shareholders meeting to consider the plan was not issued until August 25, 1985. The Petitioner's speculation is unfounded. The acquisition plan was made public on May 6,

1985, and was well known to Uniroyal shareholders by August 1, 1985.

At pages 25-26 of the Petition, Petitioner argues that the settlement agreement "sealed the fate" of the class of the preferred shareholders. This is not true. First, the settlement was subject to court scrutiny and any preferred shareholder had the right to oppose the settlement or "opt out" of the class. The Petitioner complains, at page 18 of the Petition, that at the settlement hearing, the trial judge "excoriated petitioner for having dared to file objections." Again, this is not true. The trial judge extended every courtesy to Mr. Leighton, and was exceedingly patient.

The Petitioner argues, at page 31, that since the New Jersey courts have denied him standing to bring suit

to remedy CDU's alleged violation of the ICA, the Respondents are now "beyond the reach of federal law." As noted above, there was no violation of the ICA. Further, assuming arguendo, any such violation took place, the Securities and Exchange Commission may bring suit to enforce compliance under ICA § 42(e), 15 U.S.C. Sec. 80a-41(e). Anyone willfully violating the ICA is subject to a $10,000 fine and five years imprisonment. ICA § 49, 15 U.S.C. Sec. 80a-48.

The Petition contends, at pages 40-41, that Ilan K. Reich, a disbarred attorney, had been involved in the Uniroyal recognization and that Mr. Reich "may have 'leaked' the information" regarding CDU's acquisition of Uniroyal to Respondent Pogostin's attorneys. As noted above, that information

had been known to the public long before the complaint was filed.

The Petition, at page 42, challenges the amount of fees awarded to Respondent Pogostin's attorneys and to M.J. Whitman & Co., Inc., the Respondent's expert investment banker, a claim not made by Petitioner in the trial court. In this case, Respondent Pogostin's attorneys conducted extensive discovery and, at the time of settlement, the case was fully prepared for trial. The benefit to the class of $12 to $25 million was very substantial. The fee awarded represents only 2.5% of such amount. Moreover, as noted, the settlement produced benefits as great or greater than could have been obtained if the action had proceeded to trial and Respondent Pogostin prevailed. Accordingly, the record makes clear that,

based upon services rendered and results obtained, the award of legal fees was proper.

The trial court also properly exercised its discretion in awarding fees to Respondent Pogostin's investment banker. Expert's fees have been awarded in class action cases where the professional's services were necessary to prosecution of the case.[14] Thus, the fees of M.J. Whitman & Co., Inc. were properly made part of the settlement. Mr. Whitman, an investment banker and faculty member of Yale University School of Organization and Management, did an exhaustive due diligence examination of Uniroyal and the proposed transactions and settlement, and prepared a report.

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14. See, e.g., Jezarian v. Csapo, 483 F.Supp. 385 (S.D.N.Y. 1979), where the court awarded accountant's fees of $450,000 for services rendered in a securities class action.

The fee awarded his firm was modest when compared to the fees of other investment bankers for similar services.

Finally, at page 45, of the Petition, the Petitioner contends that the New Jersey courts should have disqualified Sidney B. Silverman as one of the attorneys for Respondent Pogostin, because Mr. Silverman's firm had been required to pay costs under Rule 11, F.R. Civ. Proc. in Andre v. Merill Lynch Realty Assets Trust[15]. Mr. Silverman, a member of the New York Bar, was admitted pro hac vice under New Jersey Rule 1: 21-2. That rule provides that upon application for permission to appear pro hac vice, an attorney of another jurisdiction must submit an affidavit stating that "he is a member in good standing of the bar of the highest court

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15. 97 F.R.D. 699 (S.D.N.Y. 1983).

of the state in which he is domiciled or has his principal office for the practice of law," that he is associated with New Jersey counsel of record qualified to practice pursuant to R. 1:21-1, that the client has requested the representation, and that there is good cause for the proposed admission. The imposition of costs or attorneys' fees against an attorney under Rule 11 does not affect such attorney's "good standing" in New York,[16] and there is record evidence of Mr. Silverman's good standing in that state at the time of his New Jersey admission. Accordingly, the sanctions imposed in Andre were not relevant to Mr. Silverman's representation of Respondent Pogostin in this action.

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16. Respondent is unaware of any jurisdiction in which a Rule 11 violation has been held to affect standing.

CONCLUSION

For the reasons set forth above and in the decisions below, the Petition for Certiorari should be denied.

Dated: November 4, 1987

Respectfully submitted,

Sidney B. Silverman
Counsel of Record

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Bernard Pogostin

APPENDIX

APPENDIX TO BRIEF IN OPPOSITION TO CERTIORARI

TABLE OF CONTENTS

	Page
Letter of William Leighton To Sidney B. Silverman dated February 16, 1986 with attachment.	1r-3r
Stipulation of Dismissal	4r-6r

William Leighton
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

February 16, 1986

Sidney B. Silverman, Esq.
Silverman & Harnes
135 East 36th Street
New York, N.Y. 10016

Re: No. A-2522-85T6 Leighton v. Pogostin and Uniroyal, et al. Appellate Division Superior Ct., N.J.

Dear Mr. Silverman:

You have telephoned me on February 12 suggesting that I discontinue the above numbered appeal from a $600,000 judgment rendered in Chancery Court, Bergen County against Uniroyal, Inc.

(Cont. page 2)

I would be willing to discontinue the appeal if the attached proposed stipulation were agreed to by the principals for the parties to the appeal. This proposal should not be construed as abandoning the position which I have set forth in the pre-argument statement that accompanies my notice of appeal.

Uniroyal may benefit from the appeal because there is no judgment requiring it to pay $150,000 to plaintiff's expert, M.J. Whitman & Co., Inc. The judgment is for $600,000 only, representing at $200 per hour, 3,000 hours of work. Uniroyal has already benefited to the extent of some $10,000 representing interest at 7% on the $600,000 which it has not yet paid in satisfaction of the judgment.

(Cont. page 3)

Should you agree to the terms of the proposed stipulation or should you have alternative proposals, please sign and return to me this document for submission to the appellate court for action under R. 2:8-2. As I read the rule, no order of the appellate court is necessary for the approval of the stipulation.

Sincerely,

s/

William Leighton

cc: Lawrence B. Pedowitz, Esq.
John H. Hall, Esq.

STIPULATION OF DISMISSAL

Whereas, William Leighton, a stockholder of record of the First Preferred shares of appellee Uniroyal, Inc. has docketed, on February 3, 1986, an appeal from the judgment No. J 97-86 in the amount of $600,000 entered on January 2, 1986 in Chancery Court of Bergen County, Docket No. C 4115-85,

Whereas, the proceedings on this appeal may delay the implementation of the settlement approved by the said Chancery Court on November 21, 1985 by order of same date,

Whereas, the parties to this appeal recognize that the outcome cannot be predicted with certainty in light of appellant's position as outlined in his civil case pre-argument statement dated January 31, 1986, accompanying his notice of appeal,

Whereas, appellees Uniroyal, Inc. et al. recognize that appellant has expended disbursements and approximately one hundred and twenty-five hours of work preparing, filing and presenting his objections to the settlement and in preparing his notice of appeal and pre-argument statements,

NOW, therefore, it is stipulated by and between William Leighton, pro se, and the attorneys for Uniroyal, Inc. et al. as follows:

1. This appeal shall be dismissed pursuant to Rule 2:8-2 of the Rules Governing Appellate Practice in the Supreme Court and the Appellate Division of the Superior Court of New Jersey upon payment of $25,000 to William Leighton by Uniroyal, Inc. or CDU Holdings, Inc., at their option, by certified or cashier's check and upon

like payment of $250 as and for reimbursement of disbursements.

2. The signature by the parties to this appeal shall immediately render this stipulation effective and all proceedings on this appeal pending on such effective date shall then be discontinued with prejudice and without costs to either party.

No. 87-556

Supreme Court, U.S.
FILED
NOV 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM LEIGHTON,

Objector-Petitioner,

vs.

UNIROYAL, INC., ROSS BARZELAY, DAVID BERETTA, NORBORNE BERKELEY, JR., E. PAUL CASEY, FREDERICK COLOMBO, E. RAYMOND COREY, JOSEPH P. FLANNERY, ALLEN J. KROWE, HORACE G. MCDONNELL, JR., BURNELL R. ROBERTS, HOWARD B. WENTZ, JR. AND W. THOMAS YORK

Defendants-Respondents,

and

BERNARD POGOSTIN,

Plaintiff-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF THE STATE OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CLYDE A. SZUCH
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LIST OF PARTIES

Petitioner William Leighton was the sole objector to the proposed settlement of this shareholder's derivative action challenging the merger of Uniroyal, Inc. ("Uniroyal") and CDU Acquisition, Inc. Petitioner became a shareholder of record of Uniroyal on November 18, 1985, only three days prior to the hearing on the proposed settlement.

Respondent Uniroyal was the defendant below.* Uniroyal filed a certificate of dissolution on December 2, 1986, and distributed its assets and liabilities to CDU Holding, Inc. ("CDU Holding"), a non-party to these proceedings.

Respondents Ross Barzelay, David Beretta, Norborne Berkeley, Jr., E. Paul Casey, Frederick Colombo, E. Raymond Corey, Joseph P. Flannery, Allen J. Krowe, Horace G. McDonnell, Jr., Burnell R. Roberts, Howard B. Wentz, Jr. and W. Thomas York (the "Directors") were also defendants below. Each of them was a director of Uniroyal at the time of the transactions underlying the complaint.

Respondent Bernard Pogostin was the plaintiff below and a holder of Uniroyal's First Preferred stock at the time of the transactions that formed the basis for his derivative action.

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*In accordance with this Court's Rule 28.1, a statement of corporate affiliations of Uniroyal, Inc. has been included in the Appendix hereto at Ra2-3.

TABLE OF CONTENTS

	Page
List of Parties	i
Table of Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	4
1. Petitioner's Supremacy Clause Claim Is Not Raised By The Record	4
2. The Supremacy Clause Is Not Properly Invoked Here Because No Conflict Exists Between State And Federal Law	5
3. The Equal Protection Claim Is Improper Because It Was Not Raised In The Highest Court Below	6
4. The Record Does Not Support The Equal Protection Claim	7
Conclusion	8
Appendix	Ra1

TABLE OF AUTHORITIES

Cases	Page
Cardinale v. Louisiana, 394 U.S. 437 (1969)	6
Hamm v. City of Rock Hill, 379 U.S. 306 (1964)	5
Herndon v. Georgia, 295 U.S. 441 (1935)	6
John v. Paullin, 231 U.S. 583 (1913)	6
Orzeck v. Englehart, 195 A.2d 375 (Del. 1963)	5
Progress Development Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961)	5
United Asset Management Corp., [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) §77,088 (SEC No-Action Letter, Nov. 27, 1981)	5
Statutes and Rules	
United States Constitution, Art. VI, Cl. 2	4, 5
15 *U.S.C.* § 80a-3(a)	4
15 *U.S.C.* § 80a-3(a)(3)	4
15 *U.S.C.* § 80a-7(a)	4
28 *U.S.C.* § 1257(3)	6
Fed. R. Civ. P. 23.1	3, 6
N.J.S.A. 14A:3-6(1)	5
R. 2:12-4	3
R. 4:32-5	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM LEIGHTON,
Objector-Petitioner,

vs.

UNIROYAL, INC.,
et al.,
Defendants-Respondents,

and

BERNARD POGOSTIN,
Plaintiff-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF THE STATE OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents Uniroyal and the Directors do not adopt Petitioner's argumentative and inaccurate Statement of the Case. For a general recital of the chronology of events underlying this litigation, they respectfully refer this Court to that portion of the opinion of the Appellate Division of the Superior Court of New Jersey reproduced at pages 20a-32a of Petitioner's Appendix.

The Pogostin Action

On August 1, 1985, Bernard Pogostin filed a complaint seeking a mandatory injunction requiring Uniroyal to redeem its First Preferred stock as part of the proposed merger of Uniroyal and CDU Acquisition, Inc. Mr. Pogostin owned Uniroyal First Preferred stock at that time, having purchased his shares in

November 1978. Respondent's Appendix at 18 (hereafter cited as "Ra "). Following discovery, there were settlement negotiations and the parties eventually reached a settlement under which the terms of the First Preferred were amended. The trial court scheduled a hearing for November 21, 1985 to consider the fairness, reasonableness and adequacy of that settlement.

The Settlement Hearing

Only one First Preferred shareholder, Petitioner herein, filed objections to the settlement.* The objections, dated November 6 and November 7, 1985, attempted to raise many issues, including the purported application of the Investment Company Act of 1940 ("the ICA") to the merger and Mr. Pogostin's standing to sue. *See* Ra7-17. Affidavits and briefs directed to the merits of these objections were filed in support of the settlement. 5a.

The Chancery Court's Decision

On November 21, the trial court heard argument from all parties, including Petitioner. At the conclusion of the hearing, Judge Lester approved the settlement, finding it to be fair and reasonable, comporting with "common sense, business judgment and logic." In addition, he found that "[a]ny questions which were raised by [Petitioner] in his letters of November 6 and 7 ha[d] been more than adequately answered in the papers filed by and the statements made by [counsel for plaintiff] and [counsel for defendants]." 5a.

The Opinion of the Appellate Division

Petitioner appealed to the Appellate Division of the Superior Court of New Jersey from Judge Lester's Final Order approving the settlement. In a well-reasoned opinion, the Appellate Division affirmed Judge Lester's decision and rejected all of Petitioner's arguments. 52a. The Appellate Division's decision focused, however, on the "substantial question as to whether [Petitioner] had the standing to object to the trial court's approval of the settlement and to prosecute this appeal." 36a.

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*At the hearing on November 21, 1985, Petitioner admitted to the court that he had only recently purchased his five shares of Uniroyal First Preferred stock, having become a record shareholder just three days before that hearing. 30a.

Relying upon precedents under Fed. R. Civ. P. 23.1, the Court held that New Jersey's contemporaneous ownership rule governing the issue of standing to bring suit also applied to the question of whether Petitioner had standing to object to the settlement. 37a-38a. The Appellate Division found that resolution of that issue was dependent upon identifying which event constituted the "transaction" of which Leighton was complaining. The Court concluded that Leighton was complaining about the merger agreements, inasmuch as the "primary reason for [his] objections was the expenditure of millions of dollars of corporate funds in support of the merger." 49a-50a. All of the relevant dates surrounding the merger transaction long preceded November 18, 1985, when Leighton became the record holder of First Preferred stock. Thus, the Court found that Leighton lacked standing to challenge the settlement.

In spite of its conclusion with respect to standing, the Appellate Division addressed the merits of Leighton's appeal. It concluded that the trial judge "did not mistakenly exercise his discretion by approving the settlement agreement concerning the merger and restructuring of Uniroyal and that all of the issues of law raised with respect thereto are clearly without merit." 52a.

Petition for Certification to the Supreme Court of New Jersey

On April 30, 1987, Petitioner filed a Petition for Certification with the Supreme Court of New Jersey. Ra4. The only constitutional issue raised in the three questions that Petitioner presented for certification was his claim that the Supremacy Clause had been violated by the lower courts' purported failure to adjudicate the merits of Petitioner's settlement objections predicated upon the ICA. The New Jersey Supreme Court denied the Petition for Certification.*

*Rule 2:12-4 of the Rules Governing the Courts of the State of New Jersey states that "[c]ertification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court . . . and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons."

REASONS FOR DENYING THE WRIT

1. Petitioner's Supremacy Clause Claim Is Not Raised By The Record.

Petitioner asserts that the Appellate Division of the New Jersey Superior Court violated the Supremacy Clause, U.S. Constitution, Art. VI, Cl. 2, when it determined that Petitioner lacked standing to challenge the settlement of a shareholders' derivative lawsuit and thus did not determine the merits of his claim that the underlying transaction had violated the ICA.

In fact, however, the issue of the application of the ICA to the Uniroyal-CDU Holding merger was considered by both the trial court (5a) and the Appellate Division (52a) and found to be meritless. It is therefore beyond dispute that Petitioner had an opportunity to challenge the settlement based upon his claim of a violation under the ICA. His contention to the contrary is false and exceeds even the bounds of zealous advocacy.

Petitioner had objected to the settlement on the grounds that CDU Acquisition, Inc., CDU Holding and Robin Acquisition Corporation were "investment companies" within the meaning of Section 3(a) of the Investment Company Act of 1940, 15 U.S.C. 80a-3(a) (1985), and that their activities violated Section 7(a) of that Act, 15 U.S.C. 80a-7(a) (1985).

Petitioner's claims were entirely without merit. None of the companies meets the definition of an "investment company." In order to be an "investment company," a company must have over forty percent (40%) of the value of its total assets invested in "investment securities." "Investment securities" are defined under the Act in Section 3(a)(3), which states:

> "[I]investment securities" includes all securities *except*: (A) government securities, (B) securities issued by employees' securities companies, and (C) *securities issued by majority-owned subsidiaries of the owner which are not investment companies*. [Emphasis added].

Here, CDU Acquisition, Inc., CDU Holding and Robin Acquisition Corporation were not investment companies because they did not own any "investment securities."

During the relevant period, CDU Holding's only asset was the common stock of its wholly-owned subsidiary, Uniroyal. Because

Uniroyal was a manufacturing and marketing business, not an investment company, Uniroyal stock was not an "investment security" within the meaning of ICA Section 3(a)(3). *See United Asset Management Corp.*, [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 77,088 at 77,744 (SEC No-Action Letter, Nov. 27, 1981); *Progress Development Corp. v. Mitchell*, 286 F.2d 222, 232 (7th Cir. 1961).* Thus, Petitioner's argument grounded in the ICA is without merit and was properly rejected as a basis for upsetting the settlement.**

2. **The Supremacy Clause Is Not Properly Invoked Here Because There Is No Conflict Between State And Federal Law With Respect To The Adjudication Of The ICA Issue.**

Even if Petitioner's argument that his ICA claim was not heard is accepted, he has not preserved an issue worthy of this Court's consideration. The Supremacy Clause provides that whenever there is a clear conflict between state and federal law, federal law will prevail. *Hamm v. City of Rock Hill*, 379 U.S. 306, 311-12 (1964). There is no such conflict in this case.

The New Jersey Appellate Division held, as a matter of New Jersey law, that an individual's standing to object to a settlement of a derivative suit should be governed by the same standard that governs an individual's standing to bring a derivative action. It concluded that Petitioner did not meet this test, and it therefore dismissed his appeal for lack of standing. The Appellate Division's interpretation of N.J.S.A. 14A:3-6(1) and Rule 4:32-5 of the Rules Governing the Courts of the State of New Jersey was totally divorced from the issue of Petitioner's right to pursue an independent cause of action under the ICA. All that was decided was that he could not raise the purported violation of the ICA (or any other matter) to defeat the settlement.

Petitioner contends that state law should not have governed his standing to press his ICA objection to the settlement.

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*For these same reasons, if Robin Acquisition had purchased Uniroyal, it would have fallen within the same exception.

**Moreover, CDU Holding is (and Robin Acquisition would have been) entitled to the exemption provided by Section 3(b)(1) of the Act, which excludes from the coverage of the Act companies that are engaged, directly or indirectly, in businesses other than investing and trading in securities. *See Orzeck v. Englehart*, 195 A.2d 375, 378-79 (Del. 1963).

But even if Petitioner were correct, and a federal procedural rule were appropriate to determine whether the ICA-based objection could be heard, that rule would also have barred the objection. Rule 23.1 of the Federal Rules of Civil Procedure imposes the identical contemporaneous ownership requirement for commencing and, by judicial interpretation, objecting to the settlement of derivative lawsuits. The Appellate Division itself discussed at length the applicability of the contemporaneous ownership requirement of Rule 23.1 in assessing an objector's standing to challenge the settlement of a derivative action. 35a-38a.

Thus, there is no conflict between the state law rule that was applied to bar Petitioner's objections and the federal rule that he implicitly seeks to have applied. Accordingly, there was no violation of the Supremacy Clause, and there is no reason to invoke this Court's jurisdiction.

3. The Equal Protection Claim Is Improper Because It Was Not Raised In The Highest Court Below And Thus Is Not Reviewable On Petition For Certiorari.

Petitioner's claim that he was denied equal protection of the laws because the Appellate Division adjudicated his lack of standing but did not consider the plaintiff's standing to sue derivatively is equally inappropriate for review by this Court.

It is essential to the Supreme Court's exercise of jurisdiction under 28 U.S.C. § 1257(3) that a substantial federal question have been properly raised in the state court proceedings. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Failure to follow the appellate channels provided by the state should be fatal to the chances of Supreme Court review, and the litigant should be deemed to have waived the federal issue, thereby removing any basis for the assertion of Supreme Court jurisdiction. *See, e.g., Herndon v. Georgia*, 295 U.S. 441 (1935); *John v. Paullin*, 231 U.S. 583 (1913).

Petitioner failed to articulate an equal protection challenge to the Appellate Division's decision in his petition to the New Jersey Supreme Court. Although Petitioner listed as an "error complained of" that "[t]he Appellate Division has focussed [sic] its attention on Petitioner's standing to object and has ignored

Pogostin's lack of standing to bring suit in New Jersey" (Ra6), he did not allege any constitutional claim based on that purported error of law. Petitioner cannot deliberately refuse to raise a federal constitutional claim in an appellate proceeding before the state's highest court and then attempt to pursue the claim for the first time before the United States Supreme Court, presumably in an effort to create a federal question. His argument has not been preserved and should not be considered by this Court.

4. **The Record Does Not Support The Equal Protection Claim.**

Even if the Court were to find that Petitioner had adequately preserved his equal protection claim, Petitioner would not, as a substantive matter, be entitled to relief under the circumstances of this case. Although Petitioner claims that the lower courts unfairly refused to assess Mr. Pogostin's standing to bring this lawsuit, Petitioner in fact has badly misrepresented the record on this issue.

Petitioner asserted his challenge to Mr. Pogostin's standing in the trial court, the Appellate Division and the New Jersey Supreme Court. Respondents refuted his claim at every stage in the proceedings. Indeed, Mr. Pogostin submitted an affidavit to the trial court stating that he owned Uniroyal Preferred Stock as of November 1978, (Ra18) and thus satisfied the contemporaneous ownership rule that served to defeat Petitioner's standing. The trial court (5a) and the Appellate Division (52a) considered all of Petitioner's arguments with respect to Pogostin's standing and found them to be without merit. Simply because the courts properly rejected Petitioner's challenges to Mr. Pogostin's standing and properly dismissed Petitioner's objections for lack of standing does not amount to a denial of Petitioner's rights under the equal protection clause.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Court should deny a writ of certiorari to review the judgment of the Appellate Division of the Superior Court of New Jersey.

Respectfully submitted,

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ELIZABETH J. SHER

Dated: November 3, 1987

CONTENTS OF APPENDIX

Statement of Corporate Affiliation Ra2

Petition for Certification to the New Jersey Supreme Court, April 30, 1987 (excerpt) Ra4

Leighton's November 6, 1985 letter of objections to settlement Ra7

Leighton's November 7, 1985 supplemental letter of objections to settlement Ra15

Affidavit of Bernard Pogostin dated November 12, 1985 in Support of Settlement and In Opposition to Objections Made by William Leighton Ra18

STATEMENT OF CORPORATE AFFILIATION

Respondent Uniroyal, Inc.'s parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation are, or arguably could be considered to be, the following:

Borg-Warner Industrial Products, B.V.
Borg-Warner Industrial Products GmbH
Borg-Warner Industrial Products, Inc.
Borg-Warner Industrial Products Ltd. (Canada)
Borg-Warner Industrial Products Ltd. (United Kingdom)
Borg-Warner Industrial Products, S.A. (Spain)
Borg-Warner Industrial Products, S.A. (Switzerland)
Borg-Warner Industrial Products, S.A.R.L.
Borg-Warner Industrial Products, S.r.1.
Borg-Warner Mechanical Seals (S.E.A.) Pte. Ltd.
BWIP Holding, Inc.
Byron Jackson Argentina, I.C.S.A.
Byron Jackson Co., S.A. Byron Jackson K.K.
C.B. Tool Distributors, Inc.
CDS Holding Corp.
CDU Holding, Inc. (a dissolved corporation)
CDU Holding, Inc. Liquidating Trust
Clayton & Dubilier, Inc.
Clayton & Dubilier Associates Limited Partnership
Clayton & Dubilier Private Equity Limited Partnership
Crane Distributing Co., Inc.
Ebara-Byron Jackson Co., Ltd.
Ibrahim Abunayyan-Byron Jackson Service Co., Ltd.
Imprimis A.G.
Interfas, S.A.
Interfas Holding, S.A.
Keel Manufacturing Co., Inc.
Nevamar Corporation
N-K Interface Ltd.
N-K International Ltd.

N-K International Holding Ltd.
Nu-Kote Canada, Inc.
Nu-Kote Canada Holding, Inc.
Nu-Kote de Columbia, S.A.
Nu-Kote Holding, Inc.
Nu-Kote International, Inc.
Nu-Kote Latin America, Inc.
The O. M. Scott & Sons Company
Office Media Co., Ltd.
Pilliod of Alabama, Inc.
The Pilliod Cabinet Company
Pilliod of Carolina, Inc.
Pilliod Export Corporation
Pilliod Holding Company
Pilliod of Mississippi, Inc.
Pilliod of Ohio, Inc.
Plunkett Distributors, Inc.
Specialty Building Products, Inc.
S. R. Engineering, Inc.
Tambour Industries, Inc.
Tex-Mar Distributors, Inc.
Uniroyal Distributing Branches, Inc.
The Uniroyal Goodrich Tire Company
Uniroyal Holding, Inc.
Uniroyal International, S.A.
Uniroyal Tire Company, Inc.
The Weimer Organization, Inc.
West-Mar Distributors, Inc.
695771 Ontario Inc. (Canada)

SUPREME COURT OF NEW JERSEY

BERNARD POGOSTIN, *Plaintiff-Respondent,* *-vs.-* UNIROYAL, INC., *et al.*, *Defendants-Respondents,* and WILLIAM LEIGHTON, *Objection-Petitioner-Movant,*	No. 26,965

PETITION FOR CERTIFICATION

to review the final judgment of the Appellate Division, Part D, entered on January 29, 1987

WILLIAM LEIGHTON
Petitioner-Objector-appellant
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

New York, NY
April 30, 1987

Questions Presented

1. Whether Article VI of the Constitution of the United States required the Appellate Division judges to apply Section 7(a) of the Investment Company Act of 1940, 15 U.S.C. Sec. 80a-7(a), to the consummation of a transaction, the Uniroyal-CDU merger, that is violative of that statute.

2. Whether this Court should consider defendants-appellees' brief and appendix filed below under the supervision of Ilan K. Reich, the Wachtell-Lipton partner who had conceived the Uniroyal-CDU merger and who is now serving a prison sentence for securities fraud.

3. Whether the judgment approving the settlement of this action should be vacated and a receiver appointed for Uniroyal since the defendants are carrying out the merger planned by Ilan K. Reich.

ERRORS COMPLAINED OF

* * *

9. The liquidation and dissolution, for speculative purposes, of a 95-year old New Jersey corporation with assets over one billion dollars, should have been given close scrutiny by the courts below. The settlement is a device to prevent such scrutiny by the courts, State and Federal, since the injunction contained in the final judgment bars the assertion of any claims arising out of the merger transactions.

10. The Appellate Division has/focussed its attention on petitioner's standing to object and has ignored Pogostin's lack of standing to bring suit in New Jersey.

As a nonresident, Pogostin should have been required to post security for costs on his derivative claim just as he had been required, in 1982, to post $75,000 security in a derivative suit involving the Grumman Corporation.

Had there been a genuine controversy between Pogostin and Uniroyal, the latter would have invoked the business judgment rule as a bar to Pogostin's derivative claims.

Respectfully submitted:

/s/

William Leighton
Petitioner, objector-appellant
below
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

New York, N.Y.
April 30, 1987

William Leighton
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

November 6, 1985

Clerk
Superior Court of New Jersey
Chancery Division: Bergen County
Bergen County Courthouse
Hackensack, N.J. 07602

Re: Civil Action No. C 4115-85E
Pogostin v. Uniroyal

Dear Sir:

I refer to the Notice of Pendency of Class Action and Proposed Settlement and Notice of the Proposed Dismissal and Compromise of Derivative Claims dated October 11, 1985 and signed by the Hon. Sherwin D. Lester, J.S.C. as published in the Wall Street Journal. The Notice states:

> Any person who objects to the Settlement Stipulation, the settlement and compromise, the judgment to be entered herein, or the award of attorneys' fees and expenses to plaintiff's counsel, *or who otherwise wishes to be heard,* may appear in person or by his attorney at the Hearing and present any evidence or argument that may be proper and relevant.

I am such a person and hereby give notice of intention to appear on the grounds and for the reasons that follow but not by way of limitation:

1. **No jurisdiction.**

Article III, Section 2 of the Constitution of the United States vests in Federal district courts jurisdiction over Cases or Controversies between citizens of different States. Here, defendant Uniroyal is a New Jersey corporation. The individual defendants seem to be citizens of the several States. The plaintiff's citizenship is not stated. Several nonparties to the action (the CDU entities) are parties to the stipulation of settlement but not defendants.

If there is complete diversity between the parties, this Court would not have jurisdiction over the subject matter of the action and Pogostin's complaint should be dismissed with prejudice as to him.

2. **No Case or Controversy.**

Whether arising under the Constitution of the United States or that of New Jersey, the basic elements of a Case or Controversy are these:

(i) that there be a claim as to which relief can be granted;

(ii) that there be jurisdiction over the subject matter and the parties;

(iii) that the class representative, being a fiduciary, fairly and adequately represent the class with diligence, wisdom and integrity, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, at 549-550 (1949).

If this were a New York State case, Pogostin would also have to show his commitment of financial and other resources in order to insure that the adequacy of representation prerequisite is met, *Stern v. Carter*, 82 A.D. 2d 321, 340, *Tanzer v. Turbodyne Corp.*, 68 A.D. 2d 614, 620.

None of these elements are present here. First, Uniroyal has failed to move for the dismissal of the action on the three grounds set forth above. Such a motion would have been neither burdensome, nor expensive, nor inconvenient nor distractive. Decision by the Court on such a motion would have identified the precise Controversy before the Court and laid the basis for jurisdiction.[1] Without such a definition, it is impossible for the Court to rule now whether the proposed settlement is fair, reasonable and adequate. As will appear more clearly from this submission, the "story" is quite different from that described in the Notice.

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[1] The parties have broadened the scope of this action by agreeing, on September 9, 1985, to the filing of Pogostin's amended complaint. The collusive agreement shows that there is no real Controversy between them and that the amendment was filed in order to widen the base of Pogostin's releases to the defendants.

Essentially what there is before the Court is a private contract between opposing law firms stipulating to a certain course of conduct in the future. Such a contract does not need the intervention of the Court unless the parties violate it, cf. *S.E.C.* v. *Randolph et al.*, 564 F. Supp. 137 (N.D. Ca., 1983). This proposed settlement will afford the Court an opportunity to rule whether the *Randolph* decision applies in the circumstances of this case.

3. **Real party in interest—the plaintiff.**

Nothing is said in the Notice about the plaintiff Bernard Pogostin. No *voir dire* has been conducted by the defendants in order to determine his capacity to sue as the real party in interest. Cf. F.R.Civ. P. 17(a).

It does not appear from the Notice *when and how* Pogostin has acquired his First Preferred shares of Uniroyal. Thus, the inference is permissible that upon the commencement of Icahn's tender offer of April 15, 1985, Pogostin acquired the shares which Icahn did not then offer to buy. A third party could have suggested such acquisition to Pogostin in order to create the class which Pogostin now seeks to represent. *Voir dire* conducted by the Court could elicit the facts with respect to Pogostin's acquisition.

Pogostin's position is particularly suspect because, suing derivatively, he does not seek the payment by the individual defendants to Uniroyal of the $5,900,000 paid to the Icahn Entities by Uniroyal (so-called "greenmail"). Nothing is said in the Stipulation of Settlement about this item. Yet the Releases (Exhibit 3) which Uniroyal is to deliver to the individual defendants and to the CDU nonparties seem to include this $5,900,000 item and to preclude litigation by others.[2] The payment itself is highly suspect.

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[2] In the amended complaint, Pogostin claims that he represents *all* holders of First Preferred shares. He does not.

4. **Real party in interest—the defendants.**

Clayton & Dubilier, Inc., Clayton & Dubilier Private Equity Fund Limited Partnership, CDU Holding, Inc. CDU Acquisition, Inc. and their subsidiaries (collectively "CDU") are not parties named in the caption of the action or in the proposed order and final judgment.[3] Nevertheless, they are to receive releases from Uniroyal, see Exhibit 3 to the Notice. Since they are not parties to this action, the CDU entities are not subject to the jurisdiction of this Court, thus clause 7 of the proposed order and final judgment will be inoperative as to CDU for want of personal jurisdiction.

5. **The issue under the Federal Investment Company Act of 1940 as to CDU**

Section 7(a) of the Act, 15 U.S.C. Sec. 80a-7(a) states, in pertinent part:

> No investment company organized or otherwise created under the laws of the United States or of a State and having a board of directors, unless registered under section 8, shall directly or indirectly—
>
> (2) purchase, redeem, retire, or otherwise acquire or attempt to acquire, by use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person;
>
> (3) control any investment company which does any of the acts enumerated in paragraphs (1) and (2);
>
> (4) engage in any business in interstate commerce; or
>
> (5) control any company which is engaged in any business in interstate commerce.

Section 3(a)(3) of the Act, 15 U.S.C. Sec. 80a-3(a)(3) states, in pertinent part:

> When used in this title "investment company" means any issuer which—
> is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such

[3] See Exhibit 'A', pp. 81-83 thereof for Uniroyal's description of CDU.

> issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis. ***

CDU and its affiliates is a holding company that squarely fits into the definition of Section 3(a)(3). There is no claim that CDU has registered pursuant to Section 8 of the Act prior to the Merger Agreement.[4] Thus CDU is in apparent violation of Section 7 and, if so, has come before this Court of Equity with unclean hands, *Gaudiosi v. Mellon*, 269 F. 2d 873, 881 (C.A. 3, 1959), cert. denied, 361 U.S. 902 (1959). It could very well be that Pogostin's failure to add the CDU entities as parties is due to his attorneys' knowledge that CDU is in violation of Section 7.

CDU and its affiliates should be denied any equitable relief by this Court, such as the releases which they seek from Uniroyal (Exhibit 3 to the Stipulation of Settlement). Under Section 44 of the Act, 15 U.S.C. Sec. 80a-43, this Court has an obligation to enforce Section 7 and not to condone its violation by a nonparty such as CDU. Section 44 states, in pertinent part:

> The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, *concurrently with State and Territorial courts*, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. * * *

Section 49 of the Act makes it a "white collar" crime to willfully violate *any provision* of the Act, such as Section 7. But CDU does not stop there. CDU, by this proposed settlement, is to have life-and-death powers over the First Preferred Uniroyal shares without the consent of the holders of the latter (pp.6, 50 of Uniroyal's proxy statement of August 28, 1985).[5] It would be indeed a travesty of justice if one engaged in a "white collar" crime would be given such powers over shares traded on the New

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[4] No such claim has been made by Uniroyal. See Exhibit 'A'. CDU is a party to the stipulation of settlement.

[5] Exhibit 'A'.

York Stock Exchange where the First Preferred is actively traded at the present time.

6. **The issue under the 1940 Act as to the Icahn Entities**

Under the heading "Background and Description of the Action" an amazing story unfolds concerning the Icahn offer. Basically, Icahn created Robin Acquisition Corporation ("Robin") for the purpose of acquiring Uniroyal common at $18 per share in debt securities of undetermined value. The Icahn offer thus scared the individual defendants into creating CDU and paying $22 per share in cash for Uniroyal common, including Icahn's.

No claim has been made by Icahn that Robin had registered under Section 8 of the Act prior to commencing its tender offer. Icahn is an old hand at violating Section 7. On November 3, 1983 Icahn consented to a final order enjoining another of his holding companies[6], Bayswater Realty & Capital Corp. from engaging in business while an investment company which had not registered with the S.E.C. pursuant to Section 7(a). In response he devised a scheme to circumvent that order by creating new investment companies, such as Robin, that are not subject to that injunction.

The burden of ascertaining Robin's status under the Act was clearly on the individual defendants before they were stampeded into paying Icahn $5,900,000. Evidently, if Robin was in violation of Section 7(a), equity would have enjoined the Icahn scheme, including NatWest's credit of $150,000,000 to Icahn. But the individual defendants do not claim that they have sought such relief. Therefore, they should not be heard by this Court at this time and given releases from such obvious breaches of fiduciary duties to Uniroyal. And Pogostin's derivative claims are inadequately prosecuted since he is seeking to release the individual defendants from their liability to Uniroyal without adequate consideration for the $5,900,000 paid by Uniroyal to Icahn.

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[6] Exhibit 'B', at B-2.

7. **Appointment of a Receiver for Uniroyal**

If Uniroyal has been merged into CDU in violation of Section 7 of the Act, the issue then arises what the Court should do in order to carry out its responsibilities under Section 44. The issue under Section 7 is complex in light of transactions that have been consummated. Undoing what has been done will have to be tested under the standards of Section 47(b) of the 1940 Act, 15 U.S.C. Sec. 80a-46(b), 94 Stat. 2277.

Subsection (b)(3) contemplates "recovery against any person for unjust enrichment", i.e. the $5,900,000 paid by Uniroyal to Icahn. Thus the only way that the Court may enforce Sections 7 and 47(b) of the Act is to appoint a receiver for Uniroyal to carry out the Court's orders and seek redress against the defendants. This is due to Pogostin's failure to adequately prosecute Uniroyal's rights of action against Icahn.

8. **The position of Uniroyal First Preferred Shareholders**

There are two subclasses of First Preferred shareholders: the subclass allegedly represented by Pogostin and the subclass of all persons, such as the undersigned, who have acquired First Preferred shares on the open market since May 6, 1985. Both subclasses were stayed and enjoined by Order of this Court, dated October 11, 1985, from "instituting, maintaining or prosecuting any and all actions, suits, claims, arbitrations or any other proceedings arising out of or relating to the subject matter of any of the pleadings in the *Pogostin* action or the terms of the Settlement Stipulation".

Because of that stay and injunction, no individual action against Uniroyal and CDU is possible at this time. Therefore, the Court should hear the objections of the subclass members whose fate will be sealed by the settlement if approved by the Court. Indeed, the Court should declare the rights of the subclass in view of the fact that CDU will have life-and-death power over the First Preferred shares. For example, as a result of the merger, Moody's Investors Service, Inc. has lowered the rating on Uniroyal's senior debt from Ba-2 to single B-2 and on the subordinated debt to single B-3 from single B-1. This will severely affect Uniroyal's ability to borrow in the future and

adversely affect its earnings, thus placing in jeopardy the $8.00 annual dividend on the First Preferred.

9. **Conclusion**

The proposed settlement should be rejected and a receiver should be appointed for Uniroyal to carry out the orders of the Court in accordance with the mandates of the Investment Company Act of 1940.

Respectfully submitted,

/s/

William Leighton
A beneficial holder of
First Preferred shares
of Uniroyal, Inc.
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

cc: Allan H. Klinger, Esq. Clyde A. Szuch, Esq.
John H. Hall, Esq. (copies mailed November 6, 1985)

William Leighton
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

November 7, 1985

Clerk
Superior Court of New Jersey
Chancery Division: Bergen County
Bergen County Courthouse
Hackensack, N.J. 07602

Re: Civil Action No. C 4115-85E
Pogostin v. Uniroyal

Dear Sir:

Herewith Supplemental Objections to the settlement of the above action. The Original Objections were mailed to you for filing on November 6. For clarity, the numbering of these Supplemental Objections follows the numbering of the Original Objections.

10. **Pogostin's action should be dismissed for failure to join indispensable parties**

One of the cardinal rules of civil procedure is that an action cannot be maintained in the absence of indispensable parties, see F.R.Civ.P. 12(b)(7), New York CPLR 3211(a)(10).

Some of the defendants named in the caption of Pogostin's action are directors of CDU Acquisition, Inc. (Acquiring), a New Jersey corporation that was organized in 1985, Exhibit 'A' at A-2. Defendants Flannery, Barzelay, Beretta, Wentz and York are directors of Acquiring.

Some of the defendants named in the caption of Pogostin's actions are directors of CDU Holding, Inc. (Holding). Holding was organized in 1985 as a Delaware corporation, Exhibit 'A' at A-3. Defendant Flannery is a member of Holding's board. "Four other qualified independent directors" (presumably of Uniroyal) recommended by Mr. Flannery are also Holding directors. These persons could be among the defendants in the Pogostin action.

The C & D Fund is a Connecticut limited partnership organized in 1983 as an investment partnership. C & D acts as manager of the C & D Fund. The general partner of the C & D Fund is Clayton & Dubilier Associates Limited Partnership (C&D Ltd), a Connecticut limited partnership organized for that purpose in 1983. The executive offices of the C&D Fund and of C&D Ltd. are at 270 Greenwich Avenue, Greenwich, Connecticut 06830. Each of C&D, Acquiring and Holding has its executive offices at 126 East 56th Street, New York, N.Y. 10022, see Exhibit 'A' at A-2 and A-3. C&D, a Delaware corporation, is a private investment firm which specializes in leveraged buy-outs involving management participation.

With the exception of Holding, none of these entities are represented by counsel in the Pogostin action. John H. Hall, Esq., a New York attorney, has signed the stipulation of settlement on behalf of CDU Holding, Inc. only.

Thus, Uniroyal is to release from liability its own directors, one nonparty represented by counsel (Holding) and three nonparties not represented by counsel (C&D Private Equity Fund Limited Partnership, C&D and CDU Acquisition, Inc.). As an issue of first impression, the proposed settlement will present the Court with the question of whether named defendants can release themselves from liability incurred by them as directors of absent parties. Obviously, the Court cannot declare the rights, duties and obligations of absent parties, for which reason Pogostin's action should be dismissed for failure to join as indispensable parties C&D, CDU Acquisition, Inc., CDU Holding, Inc. and the Clayton & Dubilier Associates Limited Partnership, managing the C&D Fund.

11. Conflicts of Interest must be disclosed in any communication that is *mailed* for the purpose of inducing the recipient to part with something of value, *U.S.A. v. Bronston*, 658 F. 2d 920 (C.A. 2, 1981), *cert. denied*, 456 U.S. 915 (1982).

The October 11, 1985 Notice to "All persons who are current beneficial owners of First Preferred stock of Uniroyal Inc." and to the class allegedly represented by Pogostin, does not disclose the conflicts of interest that are inherent in the position of the defendants Flannery, Barzelay, Beretta, Wentz and York as

chairman and members, respectively, of the board of Uniroyal and as members of the boards of Holding and Acquiring. In the August 28, 1985 proxy statement, these defendants have conceded such conflicts of interest, see Exhibit 'C', attached.

The Notice was published in the Wall Street Journal, which is also being mailed to subscribers and which is distributed in interstate commerce. The Notice was also forwarded, presumably by mail, to beneficial owners of First Preferred. In addition, the conflict of interest opposing CDU, Holding and its directors and the First Preferred shareholders is obvious: in order to maintain their common stock position, Holding and its directors will have to retire at least $750,000,000 in Uniroyal debt by December 31, 1987. See Exhibit 'A' at A-3. This can be accomplished only if Uniroyal assets are transferred to subsidiaries and sold or mortgaged without the consent of First Preferred shareholders.

The October 11, 1985 Notice is defective for failure to disclose these conflicts of interest. The Court should take this into account when considering the number of protests against the settlement.

Respectfully submitted:

/s/

William Leighton
A beneficial holder of
First Preferred shares of
Uniroyal, Inc.
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

cc: Allan H. Klinger, Esq.
Clyde A. Szuch, Esq.
John H. Hall, Esq. (copies mailed November 7, 1985)

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Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY
Chancery Division: Bergen County
DOCKET NO. C4115-85E

BERNARD POGOSTIN,	:	AFFIDAVIT IN SUPPORT OF SETTLEMENT AND IN OPPOSITION TO OBJECTIONS MADE BY WILLIAM LEIGHTON
Plaintiff,	:	
– against –	:	
UNIROYAL, INC.;,	:	
Defendant.	:	

STATE OF NEW YORK)
: ss:
COUNTY OF YORK)

BERNARD POGOSTIN, being duly sworn deposes and says:

I am the plaintiff in the above-entitled action and submit this affidavit in support of the proposed settlement and in answer to the objections filed by William Leighton ("Leighton").

Leighton states that it is a permissable inference that I purchased Uniroyal First Preferred on or after April 15, 1985, the date Carl Icahn ("Icahn") announced an $18 dollar tender offer for the common stock of Uniroyal. Leighton hypothesizes that such purchase would have been made with knowledge of the adverse consequences to the First Preferred and thus, may have been designed not as an investment, but as a means to enable me to bring a law suit on behalf of a "third party." Mr. Leighton's speculation is totally unfounded. I purchased First Preferred in November 1978, seven years ago, and have held such shares continuously since then.

Leighton, however, states that he purchased Uniroyal First Preferred after May 6, 1985, when the terms of the agreement with Icahn were announced. In that very month, the First Preferred traded at $50 per share and did not recover until the settlement was disclosed. On Friday, November 8, 1985, the First Preferred closed at $73 per share. Thus, Leighton has received a "windfall" benefit as a result of this settlement. I am, therefore, at a loss to understand his reason for opposing a settlement which confers a substantial benefit on him.

Leighton also asserts that the settlement will preclude a lawsuit against Icahn for "greenmail." There are two separate and complete answers to this charge. First, the settlement does not provide for a release to Icahn or his corporate affiliates. Thus, any shareholder who has standing can maintain an action against Icahn.* Second, Icahn does not appear to have engaged in "greenmail". Icahn's group owned over 3 million shares of Uniroyal common stock at the time of the leveraged buyout. Icahn received the very same price, i.e. $22 per share, as did every other Uniroyal common stockholder. The classic "greenmailer" exacts a premium for his shares alone.** While the reimbursement of expenses paid to Icahn, $5.9 million, seems high, it compares favorably with the expenses incurred by Uniroyal. Further as noted in a Wall Street Journal article that appeared on November 8, 1985,*** expenses incurred in merger and acquisition transactions are *sui generis* and reflect what the traffic will bear. In the aforesaid article, it is noted that the expenses in the Revlon takeover battle, a $1.8 billion acquisition, will approximate $100 million dollars. In the instant case, the acquisition of Uniroyal approximated $1 billion and the overall expenses approximated $44 million.

Leighton, who I am informed is not listed as a member of the Bar of New York or New Jersey, raises several legal issues concerning jurisdiction. My attorneys have advised me that

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*I have been informed by my counsel that in order to have "standing" a shareholder must have acquired his stock prior to the time of the wrong. The agreement with Icahn was made on May 6, 1985. Since Leighton acquired First Preferred after May 6, 1985, he lacks standing.

**A review of the leading greenmail activities is summarized in Exhibit "A".

***A copy of the aforesaid Wall Street Journal article is annexed hereto and marked Exhibit "B".

Leighton's contentions are so frivolous as to reflect poorly upon his good faith. My attorneys, however, are submitting a brief which answers Leighton's objections.

WHEREFORE, your deponent respectfully requests that the settlement be approved.

/s/
BERNARD POGOSTIN

Sworn to before me this
12th day of November, 1985

/s/
Notary Public